244 N.C. App.—No. 2 Pages 155-345

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 12, 2018

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 1 DECEMBER 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Divorce—equitable distribution—rental income during separation—classification—The wife argued in an equitable distribution action that the trial court erred by not classifying and awarding certain rental income generated by the marital home during the separation. The trial court classified the rental income as divisible property when it determined that the husband's mortgage payments and costs associated with a refinance more than offset any divisible credit that might be due to wife by virtue of rental income received by the husband. Furthermore, the court made a distribution of the rental income to the husband. **Lund v. Lund, 279.**

Divorce—equitable distribution—tax consequences—issue not challenged at hearing—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals rejected Husband's argument that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. The issue was raised at the hearing, and Husband declined to challenge it. **Hill v. Hill, 219.**

long as the requirements of Rule 702 are met. The reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion. **State v. Walston, 299.**

INDECENT EXPOSURE

Indecent Exposure—jury instructions—public place—viewable from place open to public—Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by instructing the jury that a public place is "a place which is viewable from any location open to the view of the public at large." The Court of Appeals already determined in another case that this instruction is an accurate statement of law. Further, the trial court was not required to instruct the jury that defendant had to be in view "with the naked eye and without resort to technological aids such as telescopes" because the evidence failed to support such an instruction. The victims here simply saw defendant exposing himself when they were getting out of the car with their groceries. **State v. Pugh, 326.**

Indecent Exposure—public place—in front of garage—visible from public road, shared driveway, and neighbor's home—Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by denying defendant's motion to dismiss his charge of indecent exposure in the presence of a minor. Even though, as defendant argued, he was on his own property, his exposure was in a public place because he was easily visible from the public road, from the driveway he shared with his neighbor, and from his neighbor's home. **State v. Pugh, 326.**

PLEADINGS

Pleadings—motion to amend—evidence supporting other issues—The trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(b) motion to amend its pleadings to add the defense of contract modification where the evidence which supported contract modification also tended to support an issue properly raised by the pleadings. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

Pleadings—motion to amend—prejudice—In a case arising from disputed amounts in a construction project, the trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(a) motion to amend its pleadings based on its conclusion that allowing the amendment on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast. Despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new defense did not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its entire theory of the case at the eleventh hour. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

WORKER'S COMPENSATION

Workers' Compensation—appeal by defendant—plaintiff's motion for attorney fees—Where defendant-employer appealed from the Industrial Commission's decision awarding plaintiff interest on the unpaid portions of attendant care compensation and attorney fees for the prior appeal, the Court of Appeals granted

plaintiff's motion for attorney fees. Defendants unsuccessfully appealed and the Court of Appeals affirmed the Commission's decision awarding compensation, so the statutory requirements of N.C.G.S. § 97-88 were satisfied. **Chandler v. Atl. Scrap & Processing, 155.**

Workers' Compensation—remand from Supreme Court—delay in requesting compensation—In a workers' compensation case, the Industrial Commission's decision on remand from the Supreme Court not to make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for attendant care services was consistent with the Supreme Court's mandate and *Mehaffey v. Burger King*, 367 N.C. 120 (2013). The Supreme Court remanded the case only for the Commission to enter an award of interest and determine attorney fees. **Chandler v. Atl. Scrap & Processing, 155.**

Workers' Compensation—settlement of personal injury claim—without written consent of employer—Plaintiff was barred by the express language of the N.C.G.S. § 97-10.2 and the General Assembly's stated intent from later claiming entitlement to workers' compensation after settling his personal injury claim without the written consent of the employer, a superior court, or Industrial Commission order prior to disbursement of the proceeds of the settlement. **Easter-Rozzelle v. City of Charlotte, 198.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

CONNIE CHANDLER, BY HER GUARDIAN *AD LITEM* CELESTE M. HARRIS, EMPLOYEE, PLAINTIFF
v.
ATLANTIC SCRAP AND PROCESSING, EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. COA14-1351

Filed 1 December 2015

1. Workers' Compensation—remand from Supreme Court—delay in requesting compensation

In a workers' compensation case, the Industrial Commission's decision on remand from the Supreme Court not to make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for attendant care services was consistent with the Supreme Court's mandate and *Mehaffey v. Burger King*, 367 N.C. 120 (2013). The Supreme Court remanded the case only for the Commission to enter an award of interest and determine attorney fees.

2. Workers' Compensation—appeal by defendant—plaintiff's motion for attorney fees

Where defendant-employer appealed from the Industrial Commission's decision awarding plaintiff interest on the unpaid portions of attendant care compensation and attorney fees for the prior appeal, the Court of Appeals granted plaintiff's motion for attorney fees. Defendants unsuccessfully appealed and the Court of Appeals affirmed the Commission's decision awarding compensation, so the statutory requirements of N.C.G.S. § 97-88 were satisfied.

Appeal by defendants from opinion and award entered on 11 August 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 6 May 2015.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher Kincheloe and M. Duane Jones, for defendant-appellants.

STROUD, Judge.

Following this Court's prior opinion affirming the Industrial Commission's award of compensation for attendant care services

provided to Connie Chandler ("plaintiff") by her husband, Lester Chandler, and our Supreme Court's affirmance of that opinion, Atlantic Scrap and Processing ("Atlantic Scrap") and Liberty Mutual Insurance Co. ("Liberty Mutual," collectively "defendants") appeal from the opinion and award of the Industrial Commission entered on remand, which awarded plaintiff interest on the unpaid portions of attendant care compensation and attorneys' fees for the prior appeal. Defendants argue that on remand the Commission failed to follow our Supreme Court's mandate because it did not make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for Mr. Chandler's attendant care services. Because the Industrial Commission complied fully with the mandates of the Supreme Court and this Court, we affirm and grant plaintiff's motion for attorneys' fees.

I. Background

We have previously set forth the factual and procedural background of this case in this Court's previous opinion:

> Plaintiff began working for Atlantic Scrap, a metal recycling facility, in 1994. Plaintiff was hired to clean Atlantic Scrap's three buildings. On 11 August 2003, plaintiff began her work duties with Atlantic Scrap at 7:00 a.m. As plaintiff was walking down a flight of concrete steps, she accidentally fell backwards, striking the posterior portion of her head and neck on the steps. When EMS personnel arrived at the scene, plaintiff was confused and agitated and had a bruise with swelling on the back of her head. Plaintiff's primary complaints at that time were headache and neck pain. Upon arriving at the hospital, plaintiff related to the treating physician that she went up a flight of stairs to begin her work when she slipped and fell, hitting her head on the stairs. Plaintiff also mistakenly stated that the month was January and that it was cold outside, despite that the month was August, and plaintiff was unaware of the year. Nonetheless, all radiological tests were negative. Plaintiff was determined to have sustained a concussion or closed head injury, a neck injury, and a right partial rotator cuff tear, all due to her fall.
>
> After her fall, during the period from 13 August 2003 through November of that year, plaintiff treated with her primary care physician, Dr. Norman Templon ("Dr. Templon"). Plaintiff's primary symptoms from her fall

continued to be global headaches, right shoulder pain, neck pain, dizziness, and insomnia. Plaintiff also developed depression due to her injuries.

In October 2003, plaintiff's husband, Lester Chandler ("Mr. Chandler"), advised Dr. Templon that plaintiff had been having significant memory problems, sensitivity to light, and some nausea and vomiting almost every day since her fall. On 31 October 2003, a brain MRI revealed that plaintiff had evidence of small vessel ischemic changes in her white matter. By November 2003, plaintiff had constant occipital headaches and frequent crying spells.

In November 2003, Dr. Templon diagnosed plaintiff as suffering from cognitive impairments secondary to post-concussive syndrome. Dr. Templon referred plaintiff to neuropsychologist Cecile Naylor ("Dr. Naylor") for evaluation of plaintiff's cognitive functioning and memory. On 3 December 2003, testing by Dr. Naylor revealed that plaintiff had selective deficit in verbal memory, impaired mental flexibility, depression, and a low energy level.

On 23 December 2003, Dr. Templon recommended that plaintiff also see a neurologist. Defendants directed plaintiff to see neurologist Carlo P. Yuson ("Dr. Yuson"). Plaintiff presented to Dr. Yuson on 14 January 2004, complaining primarily of frequent headaches and memory problems since her fall. Dr. Yuson diagnosed plaintiff as suffering from post-concussive syndrome from her fall, along with depression secondary to her fall. Plaintiff continued to see Dr. Yuson throughout March, April, and May 2004, presenting the following continuing symptoms: severe headaches, memory problems, dizziness, crying spells, insomnia, cognitive problems, and depression. Dr. Yuson recommended that plaintiff be re-evaluated concerning her cognitive functioning and memory problems.

On 3 May 2004, Liberty Mutual assigned Nurse Bonnie Wilson ("Nurse Wilson") to provide medical case management services for plaintiff's claim. Nurse Wilson arranged for plaintiff's cognitive functioning and memory to be re-evaluated by Dr. Naylor. Plaintiff presented to Dr. Naylor for testing on 28 June 2004, tearful and clinging to Mr. Chandler. Testing revealed the following: (1) plaintiff's

intellectual functioning had fallen from the borderline to impaired range; (2) plaintiff's memory functioning revealed a sharp decline into the impaired range in all areas; (3) plaintiff had a significant compromise in her conversational speech, i.e., plaintiff only spoke when spoken to, her responses were often short and often fragmented and confused, and plaintiff had difficulty responding to questions. Plaintiff also exhibited the following symptoms: (1) inability to answer questions; (2) fearful and reliant on Mr. Chandler; (3) hears people in the home without any basis; (4) is afraid to go anywhere alone, even in her own home; (5) is easily upset; (6) has significant confusion, as her speech makes no sense; (7) has poor concentration and memory; (8) her moods change quickly; (9) is incapable of performing even simple tasks of daily living; (10) is unable to cook anything; (11) takes naps during the day due to frequent insomnia at night; (12) has decreased appetite and poor energy; (13) cries easily; and (14) feels worthless. All of these test results and symptoms indicated that as of 28 June 2004, plaintiff suffered from severe and global cognitive deficits in higher cortical functioning, all as a result of her 11 August 2003 fall at work.

Beginning on or before 28 June 2004, plaintiff has been incapable of being alone and has been unable to perform most activities of daily living without assistance from Mr. Chandler. Plaintiff has required constant supervision and attendant care services on a 24-hours-a-day/7-days-a-week basis, including at night, due to her severe cognitive impairments, insomnia, paranoia, and fear of being alone. Mr. Chandler has provided the required constant attendant care services to plaintiff for the period beginning at least 28 June 2004 and continuously thereafter, without any compensation for his services.

On 20 July 2004, Dr. Naylor reported plaintiff's severe cognitive and memory impairments to Nurse Wilson, discussing Dr. Naylor's written evaluation report and conclusions with Nurse Wilson. Dr. Naylor informed Nurse Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early December 2003 and that plaintiff was no longer capable of caring

for herself and needed constant supervision, which out of necessity was being provided by Mr. Chandler. On 23 August 2004, plaintiff was determined to have reached maximum medical improvement in relation to her traumatic brain injury resulting from her fall. On 21 September 2004, defendants filed a Form 60 Employer's Admission of Employee's Right to Compensation for a "concussion to the back of the head," reporting payment of temporary total disability compensation at $239.37 per week from the date of 11 August 2003.

On 27 October 2004, plaintiff presented to Dr. Yuson, accompanied by Nurse Wilson. Dr. Yuson notified Nurse Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of 23 August 2004, when plaintiff was determined to have reached maximum medical improvement. Dr. Yuson again discussed Dr. Naylor's 20 July 2004 report with Nurse Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall. However, defendants elected not to secure attendant care services or pay Mr. Chandler for the attendant care services he provided to plaintiff.

In the period from January 2005 through October 2007, plaintiff's cognitive and emotional condition continued to slowly become worse, regressing to that of a four-year-old child due to her brain injury from her fall at work. In April 2008, Dr. Yuson opined in a written note that plaintiff was permanently totally disabled due to her brain injury from her fall at work.

Chandler v. Atl. Scrap & Processing, 217 N.C. App. 417, 418-21, 720 S.E.2d 745, 747-49 (2011) ("*Chandler I*"), *aff'd per curiam and remanded*, 367 N.C. 160-61, 749 S.E.2d 278 (2013).

On 10 December 2008, the Clerk of Court for Stokes County determined that plaintiff was incompetent and appointed Mr. Chandler as guardian of the person of plaintiff. On 11 December 2008, the Commission entered an order appointing Celeste Harris as plaintiff's guardian *ad litem* for this action.

In March 2009, Dr. Yuson again noted that plaintiff had continued to get worse in her cognitive and emotional conditions. On 3 April 2009, occupational

> therapist and life care planner Vickie Pennington ("Ms. Pennington") prepared a life care plan concerning plaintiff. Ms. Pennington's recommendations concerning plaintiff's care included, *inter alia*, that plaintiff needs constant attendant care for her lifetime, that plaintiff needs attendant care services in her home rather than in an institution or outside facility, and that it is not healthy or reasonable or best for plaintiff that Mr. Chandler continue to care for plaintiff exclusively. Dr. Yuson reviewed Ms. Pennington's life care plan, which he opined was medically necessary and reasonable for plaintiff.
>
> On 27 August 2008, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, seeking "payment of attendant care services by her husband Lester Chandler beginning 20 July 2004 forward," and an award of permanent total disability. On 12 April 2009, defendants filed a Form 33R response denying plaintiff's claim for the following reasons: (1) plaintiff's "current medical condition" was not causally related to her accident; (2) plaintiff was not permanently and totally disabled; and (3) plaintiff was not entitled to payment for attendant care services "rendered prior to written approval of the Commission, which has yet to be obtained."

Id. at 421-22, 720 S.E.2d at 749 (brackets omitted).

Plaintiff prevailed at her initial hearing before the Deputy Commissioner on 13 April 2009. *Id.* at 422, 720 S.E.2d at 749. The Deputy Commissioner found that plaintiff was permanently totally disabled and that defendants must provide all medical compensation, including payment at the rate of $15.00 per hour for Mr. Chandler's around-the-clock attendant care services starting on 28 June 2004, as well as payment for additional services as noted in plaintiff's life care plan. *Id.*, 720 S.E.2d at 749.

> On 25 August 2009, defendants appealed Deputy Commissioner Rideout's opinion and award to the Full Commission. On 20 November 2009, plaintiff moved the Commission to award interest on the past due attendant care pursuant to N.C. Gen. Stat. § 97-86.2 (2009), to be paid by defendants directly to Mr. Chandler. On 25 February 2010, the Commission filed its opinion and award, generally affirming Deputy Commissioner Rideout's opinion

> and award, but changing the hourly rate for attendant care services payable to Mr. Chandler to $11.00 per hour for 15 hours per day, rather than $15.00 per hour for 24 hours per day. The Commission declined to award interest to Mr. Chandler "in its discretion."
>
> On 26 February 2010, plaintiff filed a motion to amend the Commission's 25 February 2010 opinion and award, this time seeking an order of mandatory payment of interest to plaintiff, instead of to Mr. Chandler, pursuant to N.C. Gen. Stat. § 97-86.2. On 7 February 2011, the Commission filed an order declining to award plaintiff the interest. Plaintiff and defendants filed timely notices of appeal to this Court.

Id. at 422-23, 720 S.E.2d at 749-50.

In the first appeal, defendants' main argument was that the Commission erred in compensating Mr. Chandler for attendant care services because plaintiff failed to request prior approval from the Commission for these services. *Id.* at 425, 720 S.E.2d at 751. On 20 December 2011, this Court disagreed with defendant and held that Mr. Chandler was entitled to compensation for attendant care services, because "defendants had notice of plaintiff's required attendant care services, which out of necessity, were being provided by Mr. Chandler." *Id.* at 427, 720 S.E.2d at 752. On 8 November 2013, on discretionary review, our Supreme Court affirmed *per curiam* this Court's decision but remanded the case to the Commission "for further proceedings not inconsistent with [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)]." *Chandler v. Atl. Scrap & Processing*, 367 N.C. 160-61, 749 S.E.2d 278 (2013).

On 11 August 2014, on remand, the Commission noted the "lengthy procedural history" of this case and concluded that

> the only matters before the Commission pursuant to the remand by the appellate courts and the 9 January 2012 and 30 December 2013 mandates of the Court of Appeals are for the Commission to (1) enter an award of interest on the unpaid balance of the attendant care compensation that defendants owe to plaintiff pursuant to N.C. Gen. Stat. § 97-86.2 and (2) determine the amount of attorneys' fees to be awarded to plaintiff's counsel pursuant to N.C. Gen. Stat. § 97-88 for defending against defendants' appeal to the Court of Appeals.

The Commission accordingly awarded interest on the unpaid balance of attendant care compensation and attorneys' fees. On or about 18 August 2014, defendants moved to reconsider. On 29 August 2014, the Commission denied the motion. On 24 September 2014, defendants gave timely notice of appeal.

II. The North Carolina Supreme Court's Mandate

[1] Defendants argue that on remand the Commission failed to follow our Supreme Court's mandate by failing to make additional findings of fact on the issue of the reasonableness of plaintiff's delay in requesting compensation for Mr. Chandler's attendant care services. Defendants point out that in its mandate, our Supreme Court referenced its holding in *Mehaffey*:

> For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court, and this case is remanded to that court for further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*.

Id., 749 S.E.2d 278. Defendants essentially argue that because the *Mehaffey* case was remanded for additional findings of fact as to the reasonableness of that plaintiff's delay in requesting compensation, the Supreme Court must have intended the same for this case. *See Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257. We disagree, based on the wording of the Supreme Court's mandate, its affirmance of this Court's prior opinion, and the differences in the factual situations and findings made in *Mehaffey* as compared to this case.

A. Standard of Review

We review *de novo* the Industrial Commission's conclusions of law. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000).

B. Analysis

Our Supreme Court's mandate is somewhat cryptic, so we must review the mandate carefully, along with the exact procedural posture of this case and the ruling in *Mehaffey*, to understand what it was directing the Commission to do. Essentially the Supreme Court issued two directives in its mandate:

> 1. For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the

> Court of Appeals is affirmed as to the matter on appeal to this Court, and
>
> 2. this case is remanded to that court for further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*.

Chandler, 367 N.C. 160-61, 749 S.E.2d 278.

i. Our Supreme Court's Affirmance

First, the Supreme Court *affirmed* the prior Court of Appeals opinion, "as to *the matter on appeal* to [the Supreme] Court[.]" *Id.*, 749 S.E.2d 278 (emphasis added). It affirmed the opinion "[f]or the reasons stated in *Mehaffey*[.]" *Id.*, 749 S.E.2d 278. Since "the matter on appeal to" the Supreme Court was affirmed, we must determine what "matter" was "on appeal[.]" *See id.*, 749 S.E.2d 278. In *Chandler I*, both plaintiff and defendants appealed the Commission's opinion and award. *Chandler I*, 217 N.C. App. at 418, 720 S.E.2d at 747. The plaintiff's "sole issue" on appeal before the Court of Appeals was "whether the Commission erred as a matter of law in denying interest to plaintiff on the award of unpaid attendant care, accruing from the date of the initial hearing until paid by defendants." *Id.* at 423, 720 S.E.2d at 750. This Court agreed with plaintiff and ruled that the Commission did err by failing to award interest. *Id.* at 425, 720 S.E.2d at 751.

In *Chandler I*, defendants also appealed from the Commission's opinion and award and their appeal to this Court raised three issues. The first argument was "that the Commission erred in awarding plaintiff compensation for attendant care services" because "plaintiff was required to obtain written authority from the Commission to recoup fees associated with the rendition of attendant care services by Mr. Chandler" and that "they were not advised of plaintiff's attendant care needs[.]" *Id.*, 720 S.E.2d at 751. We rejected this argument in *Chandler I*. *Id.* at 427, 720 S.E.2d at 752. Defendant's second issue in *Chandler I* was the hourly rate of compensation which the Commission awarded for the attendant care services, and the third issue was the Commission's award of attorneys' fees to plaintiff. *Id.* at 427, 429, 720 S.E.2d at 752-53. We rejected both of these arguments as well, and thus affirmed the Commission's opinion and award except as to the issue raised in plaintiff's appeal, the award of interest, and we remanded to the Commission "for a determination as to the proper award of interest to plaintiff on the unpaid portion of attendant care services pursuant to the terms of N.C. Gen. Stat. § 97-86.2." *Id.* at 430, 720 S.E.2d at 754.

The opinion of this Court in *Chandler I* was unanimous, so defendants petitioned the Supreme Court for discretionary review on issues of "interpretation and application of section 14 of the Workers' Compensation medical fee schedule as it relates to a claimant's entitlement to attendant care services[.]" (Original in all caps.) In their petition, defendants noted some confusion in this area of law based upon some "inconsistent decisions by the Supreme Court and Court of Appeals" on the issue of "whether a workers' compensation claimant must seek pre-approval of attendant care services before these services are compensable[.]" Defendants stated the issue to be briefed on discretionary review as follows: "Whether the Court of Appeals erred in affirming the Full Commission's award of retroactive attendant care benefits even though Plaintiff failed to seek prior approval for attendant care?" The Supreme Court granted discretionary review. *Chandler v. Atl. Scrap & Processing*, 366 N.C. 232, 731 S.E.2d 141 (2012).

Before the Supreme Court, the defendants presented the following arguments:

> I. THE COURT OF APPEALS ERRED IN AFFIRMING THE FULL COMMISSION'S AWARD OF RETROACTIVE ATTENDANT CARE BENEFITS EVEN THOUGH PLAINTIFF FAILED TO SEEK PRIOR APPROVAL FOR ATTENDANT CARE.
>
> > A. The Court of Appeals' Decision Ignores the Directive of N.C. Gen. Stat. § 97-25 Allowing Defendants to Direct Medical Treatment.
> >
> > B. The Court of Appeals' Decision is Inconsistent with the Industrial Commission's Fee Schedule.
> >
> > C. The Court of Appeals' Decision is Inconsistent with This Court's Decision in [*Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E.2d 539 (1954)].
> >
> > D. The Court of Appeals Erred in Basing its Decision on N.C. Gen. Stat. § 97-90.

(Portion of original underlined and page numbers omitted.)

In the first clause of its mandate, the Supreme Court's ruling upon these arguments was as follows: "For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court[.]" *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. The "matter on appeal" was

quite specifically the award of compensation for attendant care services provided by Mr. Chandler, and defendants had challenged the legal and factual basis for this award. In *Mehaffey*, the Supreme Court addressed essentially the same arguments as to N.C. Gen. Stat. § 97-25, the fee schedule, and the interpretation of *Hatchett*, and rejected those arguments; for the same reasons, the Supreme Court affirmed the Court of Appeals' opinion in this case. *Id.*, 749 S.E.2d 278; *Mehaffey*, 367 N.C. at 124-28, 749 S.E.2d at 255-57. Thus we will now consider the second part of the mandate, which is the remand to this Court for "further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*." *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278.

ii. Our Supreme Court's Remand

In *Mehaffey*, on 13 August 2007, the plaintiff suffered a compensable injury to his left knee while working as a restaurant manager. *Mehaffey*, 367 N.C. at 121, 749 S.E.2d at 253. The Supreme Court summarized plaintiff's medical history as follows:

> As a result of his injury, plaintiff underwent a "left knee arthroscopy with a partial medial meniscectomy" at Transylvania Community Hospital. Plaintiff's condition failed to improve after surgery, and he ultimately developed "reflex sympathetic dystrophy" ("RSD"). Despite undergoing a number of additional procedures, plaintiff continued to suffer pain. Plaintiff eventually was diagnosed with depression related to the injury and resulting RSD, and his psychiatrist concluded that it was unlikely plaintiff's "mood would much improve until his pain is under better control."
>
> Likely due to pain, plaintiff increasingly attempted to limit his movements following his diagnosis of RSD. By 8 April 2008, plaintiff was using "an assistive device" to move or walk around. On 21 April 2008, John Stringfield, M.D., plaintiff's family physician, prescribed a mobility scooter for plaintiff, and medical records show that by 20 June 2008, plaintiff was using a walker. On 18 December 2008, plaintiff requested a prescription for a hospital bed from Eugene Mironer, M.D., a pain management specialist with Carolina Center for Advanced Management of Pain, to whom plaintiff had been referred as a result of his diagnosis with RSD. Dr. Mironer's office declined to recommend a hospital bed, instructing plaintiff to see his

> family physician instead. That same day plaintiff visited his family physician, Dr. Stringfield, who prescribed both a hospital bed and a motorized wheelchair.

Id., 749 S.E.2d at 253 (brackets omitted). Beginning in March 2009, a nurse consultant and other individuals recommended that the plaintiff receive attendant care services. *Id.* at 122, 749 S.E.2d at 254. On 6 April 2009, the plaintiff requested a hearing to determine the defendants' liability for these attendant care services. *Mehaffey v. Burger King*, 217 N.C. App. 318, 320, 718 S.E.2d 720, 722 (2011), *rev'd in part*, 367 N.C. 120, 749 S.E.2d 252 (2013). The Commission compensated the plaintiff's wife for attendant care services that she provided beginning 15 November 2007, the date of the plaintiff's RSD diagnosis. *Id.* at 320-21, 718 S.E.2d at 722. In other words, the Commission decided to award compensation for attendant care services that began more than one year before attendant care services were recommended by a medical professional or the plaintiff made a request for such compensation. *Id.*, 718 S.E.2d at 722.

Our Supreme Court held that the Commission had authority to award retroactive compensation for the plaintiff's wife's attendant care services. *Mehaffey*, 367 N.C. at 127, 749 S.E.2d at 256-57. But the Court did not affirm the Commission's opinion and award; rather, it remanded the case for additional findings of fact and conclusions of law as to the issue of the reasonableness of the plaintiff's delay in requesting compensation for attendant care services:

> Nonetheless, we are unable to affirm the Commission's award of compensation for Mrs. Mehaffey's past attendant care services. As plaintiff concedes, to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider. *Schofield v. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). If plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement. Here, defendants have challenged the reasonableness of the timing of plaintiff's request, and the opinion and award filed by the Full Commission does not contain the required findings and conclusions on this issue. Accordingly, we remand to the Court of Appeals for further remand to the Commission to make the necessary findings of fact and conclusions of law on this issue.

Id. at 128, 749 S.E.2d at 257. The Court based its decision to remand on *Schofield*. *Id.*, 749 S.E.2d at 257.

In *Schofield*, the plaintiff suffered from a medical emergency late in the evening when he was away from home, and he sought the services of a physician who had not been selected by the defendant. *Schofield*, 299 N.C. at 588-89, 264 S.E.2d at 61. Even after the emergency was over, this physician continued to treat the defendant for seventeen months, but "neither he nor plaintiff made any attempt to notify defendant or the Commission." *Id.* at 592, 264 S.E.2d at 63. Our Supreme Court held that the plaintiff did not need prior approval from the Commission to procure his own doctor. *Id.*, 264 S.E.2d at 63. The Court relied on N.C. Gen. Stat. § 97-25 (1979), which included the proviso: "Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." *Id.* at 591-92, 264 S.E.2d at 62-63 (quoting N.C. Gen. Stat. § 97-25 (1979)). But the Court rejected the plaintiff's argument that he could indefinitely delay giving notice to the defendant or the Commission:

> The Court of Appeals interpreted [N.C. Gen. Stat. § 97-25 (1979)] as imposing no time limits whatsoever on the giving of notice or seeking of approval by an employee who changes physicians. Such a reading of the statute suggests that an employee may wait an indefinite period of time before obtaining authorization and approval from the Industrial Commission. However, it is inconceivable to us that the legislature intended to authorize an employee in this situation to give notice at his whim. Moreover, construing the statute as plaintiff urges would work a burden and an injustice on all parties involved. In fairness to everyone concerned, including the injured employee and his doctor, *an employer who is subject to liability for medical costs ought to be apprised of the fact, as soon as is practicable, that the employee is undergoing treatment and that he has procured a doctor of his own choosing to administer the treatment.*
>
> We therefore construe the statute to require an employee to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. In this case, plaintiff procured the services of Dr. Klenner during an emergency. Upon termination of the emergency, plaintiff should have given prompt notice that he was electing to have Dr. Klenner assume further treatment. Furthermore,

> as we construe the statute, plaintiff was required to obtain approval of the Commission within a reasonable time. We so hold.

Id. at 592-93, 264 S.E.2d at 63 (emphasis added). In other words, the Court held that a plaintiff must obtain the Commission's approval "within a reasonable time" after he has selected a new physician without the employer's knowledge, and the Court based its holding on the policy view that an employer should be seasonably notified when an injured employee selects a new physician since it is responsible for the employee's medical expenses. *Id.*, 264 S.E.2d at 63. The Court remanded the case to the Commission to make findings of fact as to the reasonableness of the plaintiff's delay in seeking approval from the Commission. *Id.* at 594, 264 S.E.2d at 64.

The factual situation as found by the Commission here is quite different from *Mehaffey* and *Schofield*. In those cases, the plaintiffs had selected care providers without the participation or knowledge of their employers or workers' compensation carriers. *Id.* at 592, 264 S.E.2d at 63; *Mehaffey*, 217 N.C. App. at 319-20, 718 S.E.2d at 722. Neither of them suffered from any cognitive impairment requiring the appointment of a guardian or a guardian *ad litem*. *Mehaffey*, 367 N.C. at 121, 749 S.E.2d at 253; *Schofield*, 299 N.C. at 588-89, 264 S.E.2d at 61. Additionally, in *Mehaffey*, two doctors indicated that the plaintiff would "derive greater benefit if he attempted to move under his own strength, which would force him to rehabilitate his injury." *Mehaffey*, 367 N.C. at 122, 749 S.E.2d at 253-54. But in this case, defendants directed and provided all of the medical care for plaintiff, and the physicians selected by defendants made the determination that plaintiff needed full-time attendant care. Defendants were aware of this determination essentially as soon as it was made, since Nurse Wilson, Liberty Mutual's designated medical case manager, was fully and promptly advised of plaintiff's deteriorating situation and consequent need for constant attendant care services. She was also aware that plaintiff's husband was, of necessity, providing the attendant care services. In addition, neither a guardian of plaintiff's person nor a guardian *ad litem* had been appointed until after plaintiff requested compensation for Mr. Chandler's attendant care services. Moreover, there was never any difference of opinion among the medical providers about plaintiff's severe cognitive impairment and consequent need for attendant care services.

In its 25 February 2010 opinion and award, the Commission made the following findings of fact, which address the issue of the reasonableness

of plaintiff's delay in requesting compensation for attendant care services and which defendants do not challenge on appeal:

> 12. On December 23, 2003 Dr. Templon also recommended plaintiff see a neurologist. *Defendants arranged for plaintiff to see neurologist Carlo P. Yuson in Winston-Salem, NC.*
>
> 13. On January 14, 2004, plaintiff saw Dr. Yuson, complaining primarily of frequent headaches and memory problems since the fall. Dr. Yuson diagnosed, and the Full Commission so finds, that plaintiff suffers from post-concussive syndrome from the fall, along with depression secondary to her fall.
>
> 14. Plaintiff saw Dr. Yuson in March, April and May 2004. Plaintiff continued to have the following symptoms due to her closed head injury from the fall: severe headaches, memory problems, dizziness, crying spells, insomnia, cognitive problems, and depression. *On April 6, 2004, Dr. Yuson recommended that plaintiff be re-evaluated concerning her cognitive functioning and memory problems.*
>
> 15. *On May 3, 2004 carrier Liberty Mutual assigned its nurse Bonnie Wilson to provide medical case management services in plaintiff's claim. Nurse Wilson arranged for plaintiff to be reevaluated by Dr. Naylor on June 28, 2004.*
>
> 16. On June 28, 2004 Dr. Naylor re-evaluated plaintiff's cognitive functioning and memory. Plaintiff was tearful and clinging to her husband. Testing revealed, and the Full Commission finds, as follows: (i) plaintiff's intellectual functioning had fallen from the borderline to the impaired range; (ii) plaintiff's memory function revealed a sharp decline into the impaired range in all areas—verbal, non-verbal, structured, and unstructured; (iii) plaintiff had a significant compromise in her conversational speech, that is, plaintiff only spoke when spoken to, her responses were short and often fragmented and confused, and she had difficulty responding to questions. All of the above conditions are due to plaintiff's closed head injury from her fall. Plaintiff's additional symptoms were as follows and are also due to her closed head injury from her fall: 1) inability to answer questions; 2) fearful and reliant on her

husband; 3) hears people in the home without any basis; 4) is afraid to go anywhere alone, even in her own home; 5) is easily upset; 6) has significant confusion as her speech makes no sense; 7) has poor concentration and memory; 8) her moods change quickly; 9) is incapable of performing even simple tasks of daily living, e.g., puts a fitted sheet on top of a flat sheet when trying to make a bed; 10) is unable to cook anything; 11) takes naps during the day due to frequent insomnia at night; 12) has decreased appetite and poor energy; 13) cries easily; and 14) feels worthless. All the foregoing test results and plaintiff's symptoms indicate that as of June 28, 2004, plaintiff suffered from severe and global cognitive deficits in higher cortical functioning.

17. Based on the totality of the evidence of record, the Full Commission finds that plaintiff's above listed conditions and symptoms and her severe and global cognitive deficits in higher cortical functioning are all a result of her closed head injury or traumatic brain injury due to her August 11, 2003 work-related fall.

18. *On July 20, 2004, Dr. Naylor gave her written evaluation report concerning plaintiff's severe cognitive and memory impairments to carrier's nurse Bonnie Wilson and also discussed the report and its conclusions with her. Dr. Naylor informed Ms. Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early December 2003, and that plaintiff was no longer capable of caring for herself and needed constant supervision which out of necessity was being provided by her husband.*

19. *By at least July 20, 2004, the carrier was well aware that plaintiff required constant attendant care services, and that plaintiff's husband was providing constant attendant care services to plaintiff without any compensation for his services.*

20. Beginning on at least June 28, 2004, and continuing, plaintiff has been incapable of being alone and has been unable to perform most activities of daily living without assistance from her husband. She has required constant supervision and attendant care services, that is, on a

24 hours a day, 7 days a week basis, including at night, due to her severe cognitive impairments, insomnia, paranoia, and fear of being alone, all due to her traumatic brain injury from her fall.

21. Dr. Yuson has continued to treat plaintiff for her severe headache condition, as well as her insomnia, emotional state, and depression resulting from her accident, with various medications which have provided some relief.

22. By on or about August 23, 2004 plaintiff reached maximum medical improvement in relation to her traumatic brain injury resulting from her fall.

23. On September 21, 2004 defendants completed I.C. Form 60 "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)" admitting plaintiff's right to compensation for her August 11, 2003 injury by accident.

24. On October 27, 2004, plaintiff saw Dr. Yuson, with Ms. Wilson in attendance. By this date, Dr. Yuson notified Ms. Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of August 23, 2004. At this meeting Dr. Yuson discussed Dr. Naylor's July 20, 2004 report with Ms. Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall.

25. On October 27, 2004, the carrier was well aware that plaintiff required constant attendant care services as provided by her husband due to her traumatic brain injury resulting from her August 11, 2003 fall. *Defendants elected not to secure attendant [care] services or pay plaintiff's husband for the attendant care services he provided plaintiff.*

26. On November 4, 2004, Ms. Wilson wrote Dr. Yuson, explaining that carrier's claim representative had requested that Dr. Yuson provide his written opinion concerning [plaintiff's] permanent work restrictions. *Since at least May 2004, one of Ms. Wilson's primary functions was to assist plaintiff in receiving the medical treatment recommended by Dr. Yuson.*

27. On December 1, 2004, Dr. Yuson responded to Nurse Wilson's November 4, 2004 correspondence with the following:

> "This in reply to your inquiry regarding [plaintiff's] disability rating.
>
> The biggest problem that [plaintiff] still is experiencing is related to the cognitive and emotional impairment which is adequately documented in her previous neuropsychological evaluations. Based on these, she has persisting moderate to severe emotional impairment even under minimal stress as well as an impairment of complex integrated higher cortical functioning necessitating constant supervision and direction on a daily basis. In light of above difficulties, the AMA disability rating list[s] a disability rating of 80% permanent disability.
>
> I hope that this . . . information is helpful in her further evaluation."

28. By early December 2004, Dr. Yuson again notified defendant Liberty Mutual that plaintiff required constant supervision due to her cognitive and emotional impairments resulting from her brain injury due to her fall.

29. *In the period since at least July 20, 2004, Liberty Mutual made no effort whatsoever to provide plaintiff with the attendant care services she required due to her brain injury.*

. . . .

34. On August 27, 2008, plaintiff filed a motion seeking an order compelling defendants to pay plaintiff's husband, Lester Chandler, for providing attendant care services to plaintiff for the period beginning July 20, 2004, forward. This request was amended in the Pre-trial Agreement to be for the period beginning June 28, 2004, the date Dr. Naylor reevaluated plaintiff's cognitive and memory functioning. Plaintiff also sought an award of permanent total disability benefits.

> 35. Plaintiff's husband Lester Chandler has provided the required constant attendant care services to plaintiff for the period beginning at least on June 28, 2004, and continuously thereafter without any compensation for his services.
>
> . . . .
>
> 43. On December 10, 2008 the Clerk of Court for Stokes County, N.C. determined that plaintiff was incompetent and appointed Lester Chandler to be her guardian.

(Emphasis added.)

In April 2004, defendants' selected physician, Dr. Yuson, recommended that another physician reevaluate plaintiff's cognitive functioning and memory problems. Nurse Wilson, whom Liberty Mutual selected to provide medical case managements services and assist plaintiff in receiving any medical treatment recommended by Dr. Yuson, arranged for Dr. Naylor to conduct this reevaluation on 28 June 2004. Based on this 28 June 2004 reevaluation, Dr. Naylor determined that plaintiff required constant attendant care services, which out of necessity Mr. Chandler was providing. On 20 July 2004, Dr. Naylor discussed this conclusion with Nurse Wilson. The Commission thus found that less than a month after 28 June 2004, the beginning of the period for which plaintiff requests compensation for attendant care services, Liberty Mutual had actual notice that plaintiff required constant attendant cares services and that Mr. Chandler was providing those services without any compensation. Liberty Mutual neither elected to secure a different provider, nor did it compensate Mr. Chandler for these services. Neither a guardian of plaintiff's person nor a guardian *ad litem* had been appointed until after plaintiff requested compensation for Mr. Chandler's attendant care services. We also note that in September 2004, defendants filed Form 60 admitting plaintiff's right to compensation for her August 2003 injury.

In addition, in defendants' first appeal, this Court arrived at this same conclusion that "defendants had notice of plaintiff's required attendant care services, which out of necessity, were being provided by Mr. Chandler" and affirmed the Commission's award of compensation to Mr. Chandler for attendant care services. *Chandler*, 217 N.C. App. at 427, 720 S.E.2d at 752. We further note that our Supreme Court affirmed *per curiam* the Court's decision. *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278.

Defendants continue to argue, as they have twice before the Industrial Commission, previously before this Court in *Chandler I*, and

before the Supreme Court, that plaintiff's delay in formally requesting attendant care services, until 27 August 2008, over four years after 28 June 2004, was unreasonable. They argue that in light of *Mehaffey*, the Commission needed to make a finding of fact as to whether this delay was reasonable. *See Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257. But the Supreme Court's mandate did not say this; it said "[f]or the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court[.]" *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. This Court and the Supreme Court have already rejected defendants' argument. *Id.*, 749 S.E.2d 278; *Chandler I*, 217 N.C. App. at 427, 720 S.E.2d at 752. The Supreme Court remanded the case to the Commission *only* to enter an award of interest on the unpaid balance of the attendant care compensation and to determine the amount of attorneys' fees to be awarded to plaintiff for defending against defendants' first appeal, and on remand the Commission properly addressed both those issues.

The *Mehaffey* Court based its holding on *Schofield*, and the *Schofield* Court, in turn, based its holding on the policy view that an employer should be seasonably notified when an injured employee seeks new or different medical treatment since it is responsible for the employee's medical expenses. *Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257; *Schofield*, 299 N.C. at 592-93, 264 S.E.2d at 63. In *Schofield*, the plaintiff did not make any attempt to notify the defendant or the Commission of his selection of a new physician for a period of seventeen months. *Schofield*, 299 N.C. at 592, 264 S.E.2d at 63. Similarly, nothing in *Mehaffey* suggests that the defendants were aware of the plaintiff's need for attendant care services or that his wife had been providing those services until the plaintiff requested compensation more than one year after the beginning of the period for which he requested compensation. *See Mehaffey*, 367 N.C. at 121-23, 749 S.E.2d at 253-54; *Mehaffey*, 217 N.C. App. at 320, 718 S.E.2d at 722. Additionally, medical professionals did not begin recommending that the plaintiff receive attendant care services until more than one year after the beginning of the plaintiff's requested period, and two doctors indicated that the plaintiff would "derive greater benefit if he attempted to move under his own strength, which would force him to rehabilitate his injury." *Mehaffey*, 367 N.C. at 122-23, 749 S.E.2d at 253-54. Because the Commission had not already made findings on this issue, the Supreme Court remanded for additional findings of fact as to the delay in requesting compensation for attendant care services. *Id.* at 128, 749 S.E.2d at 257.

In contrast, here, both Dr. Yuson and Dr. Naylor were selected either by defendants or by Nurse Wilson, Liberty Mutual's selected medical

case manager. Nurse Wilson arranged for the 28 June 2004 evaluation in which the severity of plaintiff's brain injury and plaintiff's consequent need for constant attendant care services became abundantly evident. The physicians' opinions on plaintiff's condition and need for constant attendant care services were unanimous. And it is not surprising that plaintiff herself might fail to promptly request attendant care services, since her mental functioning was at the level of a four-year-old child and neither a guardian of plaintiff's person nor a guardian *ad litem* were appointed until December 2008, four months after plaintiff requested compensation. The Commission found that Liberty Mutual had actual notice less than one month after the 28 June 2004 evaluation, which is the beginning of the period for which plaintiff requests compensation. Despite plaintiff's severe cognitive disability and need for constant attendant care, Liberty Mutual made no efforts to secure a different provider, nor did it compensate Mr. Chandler for these services. The policy concern expressed in *Schofield* is entirely absent here, because within a matter of weeks, defendants had actual notice of Mr. Chandler's attendant care services and chose not to seek alternative treatment.

Defendants essentially request that we impose a "magic words" requirement, such that to award compensation to Mr. Chandler, the Commission must state the following in its opinion and award: "Plaintiff's delay in requesting compensation was reasonable because defendants had prompt actual notice of Mr. Chandler's attendant care services from both her treating physician and another physician, that they were further aware that plaintiff's mental functioning was at the level of a four-year-old child, and they chose not to offer alternative attendant care services." We do not believe that the Supreme Court's ruling in *Mehaffey* imposes any such requirement. The Commission's extensive findings of fact, quoted above, demonstrate that the Commission has already carefully analyzed this issue and concluded in favor of plaintiff. Accordingly, we hold that the Commission's decision on remand not to make additional findings of fact on this issue was entirely consistent with *Mehaffey*. *See Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. This holding is based narrowly on the facts of this case and is in accord with the holding in *Mehaffey* that "an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." *Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257 (citing *Schofield*, 299 N.C. at 593, 264 S.E.2d at 63). "If plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement." *Id.*, 749 S.E.2d at 257. We therefore hold that the Commission properly followed our Supreme Court's mandate.

III. Motion for Attorneys' Fees

[2] Under N.C. Gen. Stat. § 97-88, plaintiff moves that we order defendants to pay her attorneys' fees incurred in defending against this appeal. N.C. Gen. Stat. § 97-88 provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2013). In *Cox v. City of Winston-Salem*, this Court interpreted this statute:

> The Commission or a reviewing court may award an injured employee attorney's fees under section 97-88, if (1) the insurer has appealed a decision to the [F]ull Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee. Section 97-88 permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal. Section 97-88 does not require that the appeal be brought without reasonable ground for plaintiff to be entitled to attorney's fees.

Cox, 157 N.C. App. 228, 237, 578 S.E.2d 669, 676 (2003) (citations, quotation marks, brackets, and ellipsis omitted). In determining whether to award attorneys' fees under this statute, we must exercise our discretion. *See Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996).

Because defendants have unsuccessfully appealed and we affirm the Commission's decision to award compensation to Mr. Chandler, the statutory requirements of N.C. Gen. Stat. § 97-88 have been satisfied. *See* N.C. Gen. Stat. § 97-88; *Cox*, 157 N.C. App. at 237, 578 S.E.2d at 676. We note that on defendants' first appeal, this Court awarded plaintiff

attorneys' fees incurred in defending against that appeal under N.C. Gen. Stat. § 97-88. *See Chandler*, 217 N.C. App. at 418, 720 S.E.2d at 747. The Supreme Court affirmed *per curiam* that opinion. *See Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. In our discretion, we again grant plaintiff's motion for attorneys' fees and remand the case to the Commission to determine a reasonable amount for appellate attorneys' fees. *See Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354.

IV. Conclusion

For the foregoing reasons, we affirm the Commission's opinion and award. We also grant plaintiff's motion for attorneys' fees and remand the case to the Commission to determine a reasonable amount for appellate attorneys' fees.

AFFIRMED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CRYSTAL COAST INVESTMENTS, LLC, D/B/A SPARKMAN CONSTRUCTION, PLAINTIFF
v.
LAFAYETTE SC, LLC, DEFENDANT

No. COA15-118

Filed 1 December 2015

1. Pleadings—motion to amend—prejudice

In a case arising from disputed amounts in a construction project, the trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(a) motion to amend its pleadings based on its conclusion that allowing the amendment on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast. Despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new defense did not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its entire theory of the case at the eleventh hour.

2. Pleadings—motion to amend—evidence supporting other issues

The trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(b) motion to amend its pleadings to add

the defense of contract modification where the evidence which supported contract modification also tended to support an issue properly raised by the pleadings.

3. Compromise and Settlement—evidence of settlement—otherwise discoverable or offered for another purpose

In a breach of contract action arising from disputed construction claims, the trial court did not err by denying a motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations. Rule 408 does not require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations.

4. Contracts—breach—waiver, modification, and formation—requests for instruction denied

The trial court did not err in a breach of contract action arising from disputed construction claims by denying requests to instruct the jury on waiver, modification, and formation. There was insufficient evidence to support the requested jury instructions.

5. Appeal and Error—attorney fees on appeal—unreasonable refusal to settle

The Court of Appeals granted plaintiff's motion for attorney fees on appeal in light of the trial court's unchallenged finding that defendant unreasonably refused to resolve the matter.

Appeal by Defendant from judgment entered 11 April 2014 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Ragsdale Liggett PLLC, by William W. Pollock and Amie C. Sivon, for Plaintiff.

Maginnis Law, PLLC, by Edward H. Maginnis and Asa C. Edwards, for Defendant.

STEPHENS, Judge.

Defendant Lafayette SC, LLC, appeals from the trial court's judgment entered after a jury trial in Wake County Superior Court resulted in a verdict awarding $341,459.97 in damages to Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction, in an

action for, *inter alia*, breach of contract. Lafayette argues that the trial court erred in denying its motions to amend its pleadings to add the affirmative defense of modification. Lafayette also argues that the trial court erred in denying its motion *in limine* to exclude certain testimony that Lafayette characterizes as evidence of settlement negotiations. In addition, Lafayette argues that the trial court erred in denying its requests for jury instructions on waiver, modification, and contract formation. After careful consideration, we hold that the trial court did not err. We consequently affirm its judgment and grant Crystal Coast's motion for attorney fees on appeal.

I. Factual Background and Procedural History

A. Factual Background

On 30 September 2008, Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction ("Crystal Coast"), entered into a contract ("the Contract") with Defendant Lafayette SC, LLC, to provide construction management services during the construction of the Lafayette Village Shopping Center in Raleigh ("the Project").

The Contract's terms provided that Lafayette, as owner of the Project, would remain responsible for all subcontractors and their work, and that in return for "furnish[ing] construction administration and management services," Crystal Coast would receive a construction management fee of $12,000 per month, plus reimbursement of all expenses including on-site personnel salaries and a 10% overhead fee, as well as monthly expense allowances for the use of a truck and a cell phone. Crystal Coast's total monthly compensation under the Contract amounted to approximately $21,500 "due and payable the first day of each month until completion of the construction or termination of [the Contract]." The Contract also provided that Crystal Coast would be compensated at a rate of $2.00 per square foot for supervising upfits of the Project's tenant spaces performed by other contractors.

The Contract defined its duration as running "from the date of commencement of the Construction Phase until the date of Completion" and further provided that Crystal Coast would receive "Final Payment" for its construction management services after

> (1) the Contract has been fully performed by [Crystal Coast], except for [Crystal Coast's] responsibility to correct nonconforming work . . . ; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by [Crystal Coast] and reviewed by

> [Lafayette's] accountants; and (3) a final Certificate for Payment has then been issued by the Architect.

The Contract identified the Project's Architect as Ron Cox, and further provided that any amendments to its terms must be in writing and signed by both parties. In addition, the Contract incorporated a separate document which outlined its General Conditions and provided, in pertinent part, that the Project would not be considered to have attained "Substantial Completion" until Crystal Coast had, *inter alia*, "arranged for and obtained all designated or required governmental inspections and certifications necessary for legal use and occupancy of the completed Project, including without limitation, a permanent or temporary certificate of occupancy for the Project."

The parties proceeded according to the Contract's terms until March 2010, when Lafayette's managing member and co-owner Ken Burnham sent a letter to Crystal Coast's owner William Sparkman stating that the Project "has fallen substantially behind schedule," that "[a]ll funds available for contingencies and overruns have been exhausted," and that the construction "must be completed by March 31, 2010." At the time, Sparkman believed the Project's Construction Phase was nearing completion and he subsequently decided to be a "team player" by foregoing his company's April fee, charging a discounted rate of $17,000 per month for May and June, and telling Lafayette that "as long as everything was paid timely, [he] would try to help with the monetary means to keep the [P]roject okay."

On 25 June 2010, Sparkman sent Lafayette an invoice for $34,000 labeled "June Invoice for extended work construction fee and misc superV [sic] final supervision and construction fee for General site building and deck" ("the June 2010 invoice"). Along with this invoice, Sparkman sent a "Partial Release of Lien" affidavit that he executed on 23 June 2010 which stated that the total amount Lafayette had paid to date on the $34,000 it owed for the pay period covering 1 May 2010 through 30 June 2010 was "$0," and that Crystal Coast would "waive, release, and relinquish any and all claims, demands, and right of lien for all work, labor, material, machinery, equipment, fixtures, and services performed an[d] furnished" during that pay period upon receipt of payment. Sparkman later testified that he labeled the June 2010 invoice as his company's "final" monthly invoice because "we were hoping we were close to the end of the [P]roject. We were close to the off-site road being completed. The buildings were close to being completed. . . . so we were hoping that we were within a couple months of being able to ratify the [P]roject." However, due to delays caused by Lafayette's financial

difficulties and multiple changes required by the City of Raleigh and the State Department of Transportation, Crystal Coast's work on the Project continued for another year, until June 2011.

By September 2010, Lafayette had not yet paid Crystal Coast's June 2010 invoice, or its subsequent discounted invoices of $8,000 per month for July and August. As the Project continued to run longer than anticipated and his own company's funds started to run low, Sparkman began discussions regarding Crystal Coast's compensation with Lafayette member Amiel Mokhiber, who had served throughout the Project as a liaison between Sparkman and Lafayette's owners. In an email dated 1 September 2010, Sparkman made clear to Mokhiber that he retained "all rights to charge the full [amount of the construction management services fee of approximately $21,500 per month provided under the Contract] for each month past and future till the [P]roject is completed." That same day, in a separate email to Mokhiber, Sparkman stated that he would be willing to reduce Crystal Coast's monthly fee if Lafayette would agree to pay $10,000 per month for eight consecutive months. On 11 September 2010, after discussing this proposal with Lafayette's other owners, Mokhiber sent Sparkman an email stating in pertinent part that:

> The following shall confirm Ken [Burnham]'s and my agreement to you with regard to your fees for site work and general construction management of Lafayette Village. This agreement shall not include fees owed Sparkman Construction for Tenant Up[]Fits.
>
> Sparkman Construction will reduce all outstanding and future construction mgt. fees for Lafayette Village (non tenant up[]fit fees) down to eighty thousand ($80,000.00) dollars.
>
> Said balance shall be paid out in eight (8) equal installments of ten thousand ($10,000.00) [dollars] per month for eight (8) consecutive months[.]
>
> . . . .

Although Crystal Coast received one payment of $10,000 under this agreement ("the Mokhiber Agreement") in September 2010, Lafayette made no payments in October or November. On 9 December 2010, Sparkman sent an email stating that, due to Lafayette's lack of timely payments, proceeding under the Mokhiber Agreement would no longer be acceptable. Sparkman's email also included a table displaying unpaid monthly invoices totaling $205,909.85, which represented the total amount that

he believed Crystal Coast could charge under the Contract for uncompensated work on the Project dating back to March 2010. Sparkman indicated that he did "not expect the entire amount . . . but the $70,000 (80,000 – 10,000 paid on 9/16/10) will not suffice any longer." Later that same week, Lafayette sent Crystal Coast two additional $10,000 checks dated 15 and 16 December 2010.

In the months that followed, Crystal Coast's work on the Project continued, and Sparkman continued to send monthly invoices reflecting the cumulative total his company was entitled to charge under the Contract. However, Lafayette made no further payments under the Contract or the Mokhiber Agreement, and the parties continued to discuss alternative ways to compensate Sparkman. At one point, Lafayette offered to pay Sparkman $50,000 plus a 1% ownership interest in the Project ("the Ownership Interest Proposal"). In an email dated 28 March 2011, Sparkman indicated he was willing to accept this proposal as long as his ownership stake would not be subject to cash calls. Lafayette was unwilling to agree to this condition, and no agreement was ever reached. By the time the Project was finally competed in June 2011, Crystal Coast had not received any payment for its work since December 2010.

B. Procedural History

On 2 December 2011, after filing a claim of lien pursuant to Chapter 44A of our General Statutes on 28 September 2011, Crystal Coast filed a verified complaint against Lafayette in Wake County Superior Court for, *inter alia*, breach of contract. Crystal Coast's complaint sought to recover damages totaling $326,786.97 plus interest, costs, and attorney fees based on its allegations that Lafayette had failed to pay the full construction management fee Crystal Coast was entitled to receive under the Contract for its services since May 2010, and had also failed to pay approximately $50,000 in tenant upfit fees.

On 22 June 2012, Lafayette filed an answer in which it admitted that the parties had entered into the Contract but denied that Crystal Coast had any right to issue invoices for work performed after May 2010, given the fact that "[i]n June of 2010 [Crystal Coast] presented Lafayette with an invoice that [Crystal Coast] itself characterized as the 'final supervision and construction fee for the General site building and deck' . . . . That final invoice generally coincided with the substantial completion of work on the Project[.]" While acknowledging that Crystal Coast continued to work on the Project after June 2010, Lafayette described this work as remedial in nature, and further asserted that although "some conversations and communications" took place between Sparkman and

"various people affiliated with the Project" about additional compensation, "no additional agreement was ever reached between [Crystal Coast] and Lafayette's designated representative, Ken Burnham, and Lafayette believed and asserted (consistent with the Contract) that [Crystal Coast] already had the obligation to correct any non-conforming work." Lafayette's answer raised an array of affirmative defenses, including payment, estoppel, waiver, failure to mitigate damages, failure to timely file any lien claim pursuant to the June 2010 invoice, and various purported breaches of the Contract by Crystal Coast entitling Lafayette to a setoff. In addition, Lafayette's answer raised counterclaims against Crystal Coast for breach of contract, negligent supervision, and slander of title.

During discovery, Burnham responded on behalf of Lafayette to Crystal Coast's interrogatories and deposition questions. These responses were generally consistent with Lafayette's prior assertion that Crystal Coast's work under the Contract ended in June 2010. In response to an interrogatory that asked him to identify why Crystal Coast was not paid its management fee after April 2010, Burnham replied that "[t]his question is denied. [Crystal Coast] was paid all but $4,000. [Crystal Coast] sent a final bill of $34,000 . . . of this $30,000 was paid." When asked to describe the basis for Lafayette's affirmative defense that Crystal Coast had failed to timely file any lien claims, Burnham replied that the Contract "terminated in mid[-]2010." During his deposition, Burnham testified that he believed the Project "was substantially completed as of the date of [Crystal Coast's] final bill" dated 25 June 2010 and that he did not recall Crystal Coast performing any additional work under the Contract thereafter, apart from tenant upfits and remedial work to correct problems with the construction. Burnham testified further that the Mokhiber Agreement was not his idea, that he never authorized it, and that he believed the three $10,000 checks Lafayette had sent to Crystal Coast in September and December 2010 were intended as payment for the June 2010 invoice. However, Burnham did acknowledge that "[i]t doesn't make any sense" for Mokhiber to have been negotiating such an arrangement in September 2010 if the Project had, in fact, been completed in June 2010.

On 26 August 2013, after Lafayette repeatedly failed to produce documents in response to discovery requests, Crystal Coast filed a motion to compel. On 4 September 2013, a mediated settlement conference was held pursuant to a court order but Lafayette did not send any officers, employees, or agents to attend and failed to seek leave of court to modify the date of the mediation or the attendance requirements. Instead, Burnham participated by telephone during a portion of the mediation,

but made himself unavailable before any agreement could be reached or an impasse could be declared. In an order entered 8 October 2013, the trial court granted Crystal Coast's motion to compel and also awarded sanctions and fees in the amount of $8,355 against Lafayette for its failure to physically attend the mediation settlement conference or make a representative fully available via telephone.

After Lafayette voluntarily dismissed its counterclaims, both parties filed motions for summary judgment. In its motion, Lafayette argued that Crystal Coast's claims "center around the fact that [it] should be paid for work and supervision performed after the Contract was terminated." Here again, Lafayette contended that the Contract had been fully performed by the time it received Crystal Coast's June 2010 invoice and Partial Release of Lien affidavit, which functioned as an application for "Final Payment" that was approved by both Lafayette and the Project's Architect, who subsequently issued a final certificate of payment. Furthermore, Lafayette claimed that Crystal Coast had already been paid $30,000 toward its June 2010 invoice, with $4,000 withheld as an offset for defective work, and that Crystal Coast "never provided any additional work [after June 2010] other than correcting non-conforming work and deficiencies, which were [Crystal Coast's] original obligations under the Contract."

For its part, Crystal Coast argued in its motion for summary judgment that Sparkman had labeled the June 2010 invoice as "final" because he had expected the Project to be completed soon thereafter, but that this expectation was frustrated by financial delays and requests for changes from Lafayette's owners, the State Department of Transportation, and the City of Raleigh, which necessitated an additional year's worth of work on the Project. In Crystal Coast's view, the Project "was not completed pursuant to the Contract until June 2011," which was when the final certificates of completion for all of the buildings on the site were issued, and thus Crystal Coast remained entitled to collect its monthly construction management fee under the Contract for the work it performed between June 2010 and the Project's completion in June 2011.

The trial court denied both parties' motions for summary judgment by order entered 23 January 2014 and the matter was eventually placed on the trial calendar for 17 March 2014. After the parties entered into a joint pre-trial order, Crystal Coast filed a motion *in limine* seeking to prohibit Lafayette from (1) introducing any exhibits or witnesses that were not disclosed in its discovery responses, (2) asserting any new defenses or theories that had not been previously outlined in its answer, affirmative defenses, or discovery responses, and (3) introducing any

testimony regarding several of Lafayette's previously pled affirmative defenses, including waiver and equitable estoppel, given that these were never developed in Lafayette's discovery responses. After a hearing, the trial court granted Crystal Coast's motion with regard to new exhibits, witnesses, and theories, but denied its request regarding affirmative defenses Lafayette had originally listed in its answer. During the same hearing, Lafayette's trial counsel stated that he had only recently made his first appearance in the matter and made an oral motion to amend Lafayette's pleadings to add the affirmative defense of modification, based on the Mokhiber Agreement. Sparkman opposed this motion, emphasizing the fact that in its prior filings and arguments, Lafayette had exclusively contended that the Contract was terminated in June 2010 and consistently denied that it was ever modified. Consequently, the trial court denied Lafayette's motion, reasoning that it would result in undue delay and undue prejudice.

During the trial that followed, Crystal Coast called eight witnesses to testify about the work it performed on the Project and also introduced over 100 exhibits into evidence documenting how Lafayette's owners requested and accepted that work both before and after the June 2010 invoice. Notably, Ron Cox, whom the Contract designated as the Project's Architect, testified that he never certified the Project as complete or issued a certificate of Final Payment in response to the June 2010 invoice. When asked to examine a document that Lafayette claimed was a certificate for Final Payment, Cox testified that he had neither signed nor seen it prior to trial. Cox testified further that he had never authorized David Thomas, whose signature appeared on the line for the Project's Architect, to act as an architect on the Project or to sign any certificates of payment, and that in any event, he believed Thomas was a designer, rather than an architect.

Sparkman himself testified during the trial that Crystal Coast continued to perform work under the Contract until the final permits and certificates of occupancy were approved by the City of Raleigh in June 2011, and that up until that point, Lafayette's owners "asked multiple times for more work, more things, more items," and never once indicated that they believed that his company's work had been completed or the Contract had terminated as a result of the June 2010 invoice. When asked to describe his discussions with Mokhiber in September 2010, Sparkman testified that while negotiating the Mokhiber Agreement, he had made clear that "[t]he $80,000 was just a helpful hand to try to make the [P]roject again move forward and to get some finances in my account." Sparkman testified further that Lafayette had been aware that

"if I was not paid that $10,000 every month of that $80,000 then they were to understand that I would charge my full rights, what I would charge per the [C]ontract." For his part, Mokhiber later testified that Sparkman insisted that their arrangement be made contingent on Crystal Coast being paid every month and confirmed that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract."

Crystal Coast also sought to introduce into evidence emails and testimony related to the Ownership Interest Proposal. Lafayette filed a motion *in limine* to exclude this evidence pursuant to Rule 408 of the North Carolina Rules of Evidence as evidence of settlement negotiations. The trial court denied this motion, reasoning, "[g]iven the fact that [Lafayette's] defense is waiver I'm going to find that this evidence comes in for a purpose other than settlement negotiations, and that is, to show Mr. Sparkman's intent or lack thereof and [Lafayette's] intent or lack thereof concerning [waiver]." Sparkman subsequently testified that Lafayette had suggested the Ownership Interest Proposal as an alternative means of compensation for Crystal Coast's continuing work on the Project, noting that Lafayette's owners told him that "the one percent would at that point of the meeting would equate to around $100,000 and two years from that April 2011 it would equate to around $270,000" which meant that "within two years I would be paid back my full requested amount." However, Sparkman testified further that the Proposal was never finalized because Lafayette would not agree to exempt his ownership interest from future cash calls.

Burnham was the only witness to testify on behalf of Lafayette at trial. Consistent with his discovery responses, Burnham testified that Crystal Coast was not entitled to any further compensation under the Contract and that he considered the June 2010 invoice and Partial Release of Lien affidavit to represent an application for Final Payment, which both Lafayette and the Project's Architect had approved, and of which all but $4,000 had already been paid. However, Burnham acknowledged that Sparkman had sent similar lien affidavits with every prior monthly invoice for Crystal Coast's work on the Project, and that his conclusion that the June 2010 invoice was an application for Final Payment was largely based on the fact that it was the last invoice he personally received from Sparkman and "[i]t says 'final' on it." Burnham also testified that although Ron Cox was the Project's Architect, at some point Burnham decided to "switch[] to a different inspecting architect. I'm not exactly sure when, but this guy, David Thomas, you know, basically offered to do it for less money," and so it was Thomas who carried

out the inspection to determine whether the Project was complete for purposes of Crystal Coast's Final Payment application, even though Thomas is not licensed as an architect in North Carolina. Although he acknowledged that Crystal Coast continued to work on the Project until the site received final approvals from the City of Raleigh in June 2011, Burnham contended that because several of the buildings on-site had already been issued certificates of occupancy and temporary permits before he received the June 2010 invoice, he did not believe such approvals were necessary in order to consider the Project "fully complete" and that roughly 90% of that work was remedial in nature to correct non-conforming work. Burnham conceded that much of this non-conforming work was originally performed by subcontractors Lafayette had hired itself based on plans Lafayette had changed, against the recommendations of both Sparkman and the Project's Architect, Cox. Nevertheless, Burnham blamed Sparkman for failing to properly supervise the subcontractors.

Burnham testified further that although he was not aware of any writing signed by both parties to amend the Contract, and despite his discovery responses denying any amendment ever occurred, he now believed the Contract had been amended as a result of the Mokhiber Agreement. Alternatively, Burnham characterized the Mokhiber Agreement as an entirely new and separate agreement between Lafayette and Crystal Coast that he initially opposed but then agreed to in order to secure Sparkman's cooperation in getting the subcontractors to fix their non-conforming work. Burnham testified that Lafayette relied on Sparkman's willingness to reduce his company's fee, and that when combined with the $30,000 Lafayette paid Crystal Coast in September and December 2010, the subsequent Ownership Interest Proposal would have satisfied its obligations under the Mokhiber Agreement had Sparkman not rejected it. When pressed by Crystal Coast's counsel as to why Lafayette would propose granting Sparkman an ownership interest—which by Burnham's own reckoning was worth a minimum of $40,000—instead of only paying the $50,000 Lafayette actually owed under the Mokhiber Agreement, Burnham explained that Lafayette's co-owners

> were championing [Sparkman's] cause and they said, you know, let's just make [Sparkman] happy and, you know, blah, blah, blah, so, you know, we met [to negotiate]. I told Mr. Sparkman I wasn't real happy with his performance at the last phase of the [P]roject getting the subcontractors back to fix their work and, you know, we discussed settling the whole issue and this is what we came up with, you know, was this settlement negotiation.

At the close of all the evidence, Lafayette made a motion to amend its pleadings to add the affirmative defense of modification pursuant to Rule 15(b) in order to conform to the evidence based on the express or implied consent of the parties because "[t]his case was tried regarding all sorts of amendments to the [Contract], whether in writing or otherwise" to which Crystal Coast never specifically objected during the trial. The trial court denied this motion, as well as Lafayette's motion for a directed verdict, and its requests for jury instructions on modification, waiver, and contract formation.

On 21 March 2014, the trial court submitted the case to the jury on the issues of whether Lafayette had breached the Contract and, alternatively, whether Crystal Coast should be entitled to recovery in *quantum meruit*. That same day, the jury returned a verdict in Crystal Coast's favor in the amount of $341,459.97. On 11 April 2014, the trial court entered a judgment reflecting the jury's verdict. On 17 April 2014, Crystal Coast filed a motion for costs pursuant to section 7A-305 of our General Statutes, as well as a motion to enforce its lien and for attorney fees pursuant to section 44A-35. On 7 May 2014, Lafayette gave notice of appeal to this Court. On 19 May 2014, the trial court held a hearing on Crystal Coast's post-trial motions. On 24 October 2014, the trial court entered an order granting Crystal Coast's motion for costs in the amount of $2,732.74. In that same order, the court found as facts that Crystal Coast was the prevailing party as defined by section 44A-35, that Lafayette "unreasonably refused to fully resolve the matter which constituted the basis of this suit by such acts as failing to attend mediation in person and offering only $4,000.00 to settle the matter," and that Crystal Coast had incurred $104,624.00 in attorney fees, which were reasonable "based upon the time and labor expended, the skill required, the customary fee for like work, [and] the experience and abilities of the attorneys" as reflected in the affidavits Crystal Coast submitted in support of its motion. As a result, the court granted Crystal Coast's motion to enforce its lien and for attorney fees. On 30 July 2015, Crystal Coast filed a motion with this Court to amend the record on appeal to reflect the trial court's order granting its costs and attorney fees, as well as a motion for attorney fees on appeal, both of which were referred to this panel.

II. Analysis

A. Lafayette's Rule 15 motions to amend the pleadings

Lafayette argues that the trial court abused its discretion in denying its motions to amend the pleadings prior to trial and at the close of the evidence to add the new affirmative defense of modification. We disagree.

(1) Lafayette's Rule 15(a) motion

[1] "Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* at 361, 337 S.E.2d at 634 (citations omitted). A motion to amend a pleading under Rule 15(a) "is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (citations omitted), *affirmed per curiam*, 361 N.C. 522, 271 S.E.2d 909 (1980).

In the present case, the trial court denied Lafayette's Rule 15(a) motion to add the defense of modification based on its conclusion that allowing such an amendment to the pleadings on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast given Lafayette's undue delay in bringing the motion. Lafayette contends this was an abuse of discretion for two reasons. On the one hand, Lafayette emphasizes certain superficial similarities between the present case and our prior decision in *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980), wherein we found no abuse of discretion in the trial court's decision to grant the defendant's motion to amend the pleadings on the first day of trial. On the other hand, Lafayette argues that there was no risk of any undue prejudice here because Crystal Coast already possessed the evidence Lafayette contends proves that the parties modified their Contract—namely, the Mokhiber Agreement and various emails, invoices, and checks that were produced or received by Crystal Coast during its work on the Project. Thus, in Lafayette's view, the fact that it never previously asserted its modification defense in its answer or in its responses to discovery requests should be immaterial because Crystal Coast's counsel had ample access to relevant evidence and ample opportunity to shape its inquiries accordingly, but failed to do so.

We are not persuaded. In *Watson*, we stated that part of our rationale for upholding the trial court's decision to grant the defendant's motion to amend nearly two and a half years after the plaintiff initiated her lawsuit was that the defendant's counsel "had been removed from the case upon [the] plaintiff's motion and the motion for amendment was the first appearance by [the] defendant's new counsel." *Id.* at 61,

270 S.E.2d at 544. Here, Lafayette highlights the fact that, as in *Watson*, its trial counsel first entered an appearance in this case shortly before moving to amend the pleadings on the first day of trial. However, there is no indication that Crystal Coast played any part whatsoever in causing the removal of Lafayette's original counsel, and while we agree with Lafayette that *Watson* demonstrates that a trial court does not necessarily abuse its discretion by granting a Rule 15(a) motion to amend on the first day of trial after years of discovery, it does not logically follow that a trial court's decision to *deny* such a motion under similar circumstances automatically amounts to an abuse of discretion. Indeed, in opposing Lafayette's motion during the pretrial hearing, Crystal Coast cited our decision in *Kinnard*. In *Kinnard*, we held the trial court did not abuse its discretion in denying the plaintiff's motion to amend the pleadings in his suit for breach of contract to add an entirely new cause of action two days prior to trial because the new allegations "would not only greatly change the nature of the defense to what was a breach of contract action but also would subject [the] defendant to potential treble damages which greatly increased the stakes of the lawsuit" and because if the motion had been allowed "further discovery and time for preparation would likely have been sought, thus further delaying the trial." 46 N.C. App. at 727, 266 S.E.2d at 16. Here, Lafayette argues that the trial court should have allowed its motion to amend because this case is more like *Watson* than *Kinnard*, but in our view, our holdings in both those cases demonstrate that we will not disturb a trial court's exercise of its broad discretion to grant or deny a Rule 15(a) motion unless its decision could not have been the product of a reasoned decision.

In the present case, our review of the record makes clear that up until the day this case was calendared for trial, Lafayette consistently and repeatedly contended that the Contract terminated in June 2010. For nearly two years, beginning with its answer and continuing throughout Burnham's discovery responses, as well as in its motion for summary judgment, Lafayette denied the Contract was ever amended and never once specifically raised the Mokhiber Agreement as a potential defense against Crystal Coast's allegations. Thus, despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new modification defense does not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its theory of what that evidence purportedly proved, and indeed, its entire theory of the case, at the eleventh hour. We therefore hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(a) motion to amend its pleadings.

(2) Lafayette's Rule 15(b) motion

[2] Lafayette also argues that the trial court abused its discretion in denying the Rule 15(b) motion it made to add the defense of modification at the close of all the evidence in order to conform the pleadings to the evidence.

Rule 15(b) provides, in pertinent part, that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2013). As our Supreme Court has explained,

> the implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Eudy v. Eudy, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87 (1975) (citations omitted), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). Moreover, "[w]here the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 630, 347 S.E.2d 473, 476 (1986) (citation omitted). "The trial court's ruling on a motion to amend pursuant to [Rule 15(b)] is not reviewable on appeal absent a showing of abuse of discretion." *Id.* (citation omitted).

In the present case, Lafayette contends that although its Rule 15(a) motion to add this same affirmative defense was denied, the evidence and testimony Crystal Coast introduced at trial supports an inference of modification, which in Lafayette's view means the issue was tried by implied consent of the parties. However, as the trial court explained in denying Lafayette's motion, Crystal Coast made no secret of its opposition to trying the issue of modification, and all the evidence Lafayette cites in support of its argument that the issue was tried by implied consent also supports an array of issues that were properly raised in the pleadings, such as Lafayette's waiver theory and Crystal Coast's burden of proving the Contract and its terms. Therefore, because the evidence which supports modification "also tends to support an issue properly raised by the pleadings," *Tyson*, 82 N.C. App. at 630, 347 S.E.2d at 476,

we hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(b) motion to amend its pleadings.

B. Lafayette's motion in limine to exclude evidence of settlement negotiations

[3] Lafayette argues that the trial court erred in denying its motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations under Rule 408 of the North Carolina Rules of Evidence. We disagree.

Although Rule 408 prohibits the introduction of evidence of conduct or statements made in settlement negotiations "to prove liability for or invalidity of the claim or its amount," we have long held that "[t]his [R]ule does not, however, require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations." *Renner v. Hawk*, 125 N.C. App. 483, 492-93, 481 S.E.2d 370, 375-76 (citations omitted), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In the present case, Lafayette raised waiver as an affirmative defense in its answer. Because waiver is "an intentional relinquishment of a known right," *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (citations omitted), we believe that evidence tending to show whether Crystal Coast intended to waive its rights under the Contract, or conversely, whether Lafayette's owners actually believed such a waiver had occurred, was both relevant and admissible. In our view, the evidence Lafayette characterizes as settlement negotiations, such as emails between Sparkman and Lafayette's owners and related testimony, clearly demonstrates that Sparkman believed his company was still entitled to compensation under the Contract, which tends to show a lack of intent to waive. Moreover, this evidence also tends to show that Lafayette's owners agreed that Crystal Coast should be paid for its continuing work on the Project, which likewise reflects a belief that no waiver had occurred insofar as it tends to contradict Lafayette's argument that Crystal Coast was not entitled to any further compensation because the only additional work it performed after the Contract terminated as a result of the June 2010 invoice was to correct non-conforming work and deficiencies. We therefore agree with the trial court that evidence of the Ownership Interest Proposal was relevant to and admissible for the purpose of showing the parties' intent or lack thereof regarding Lafayette's affirmative defense of waiver. Consequently, because this evidence was offered for a purpose other than to prove the validity or amount of Crystal Coast's claim, we hold the trial court did not err in denying Lafayette's motion *in limine*.

C. Lafayette's requests to instruct the jury on waiver, modification, and formation

[4] Lafayette argues that the trial court erred in denying its requests to instruct the jury on waiver, modification, and formation. We disagree.

"When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim." *Ellison v. Gambill Oil Co.*, 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citation omitted), *affirmed per curiam in part and disc. review improvidently allowed in part*, 363 N.C. 364, 677 S.E.2d 452 (2009). "If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error." *Id.* (citation omitted).

Before examining whether evidence existed to support each of Lafayette's requested instructions, we turn first to Crystal Coast's argument that Lafayette has failed to properly present this issue for our review due to multiple violations of our Rules of Appellate Procedure. Rule 9(a)(1)(f) requires an appellant objecting to the omission of a jury instruction to "set[] out the requested instruction or its substance in the record on appeal immediately following the [transcript of the entire charge] given," N.C.R. App. P. 9(a)(1)(f), while Rule 7(a) requires that an appellant who contends that the trial court's findings or conclusions were contrary to the evidence must "cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a). The record on appeal Lafayette submitted to this Court failed to fully comply with both these rules, and Crystal Coast urges us to deny review of the trial court's jury instructions based on these procedural defects. However, Lafayette has filed a Motion to Amend the Record on Appeal to correct these defects, which we now grant in order to review its claims.

(1) Waiver

Lafayette first contends that the trial court erred in denying its request to instruct the jury on waiver. As noted *supra*, waiver is "an intentional relinquishment of a known right." *Clement*, 230 N.C. at 639, 55 S.E.2d at 461 (citations omitted). A waiver can be express or implied "by [a party's] conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Guerry v. Am. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951). "No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the nature

and occasion of the particular waiver must lie the answer as to whether or not it requires such consideration." *Clement*, 230 N.C. at 640, 55 S.E.2d at 461 (emphasis omitted). "However, an agreement to waive a substantial right or privilege, thus altering the terms of the original contract, must be supported by additional consideration, or an estoppel must be shown." *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 426, 293 S.E.2d 749, 755 (citations and emphasis omitted), *rehearing denie*d, 306 N.C. 753, 302 S.E.2d 884 (1982).

In the present case, Lafayette argues there was sufficient evidence to support a jury instruction on waiver and specifically highlights three distinct categories of evidence to support its claim.

First, Lafayette contends that Crystal Coast expressly waived its rights under the Contract by agreeing to forego its monthly fee in April 2010 and then submitting discounted invoices in May, June, July, and August 2010, which led Lafayette to naturally and justly believe that Crystal Coast had dispensed with its right to charge the full amount under the Contract. However, our review of the record does not support Lafayette's argument. On the one hand, it is clear that Sparkman's decision to forego his company's monthly rate in April and discount its invoices for the months that followed was made in direct response to Burnham's email detailing Lafayette's financial difficulties, and Lafayette makes no argument that Crystal Coast received any consideration for this purported waiver of its substantial right to compensation under the Contract. On the other hand, Sparkman testified that although he wanted "to try to help," he also made clear that the discounted rates were conditioned on "everything [being] paid timely," and that when Lafayette failed to timely pay the discounted invoices, he explicitly informed Mokhiber that he reserved the right to charge the full amount under the Contract. We find this evidence of Sparkman's attempts to be a "team player" insufficient to support a jury instruction on waiver.

Next, Lafayette argues that Crystal Coast waived its rights under the Contract as a result of submitting its June 2010 invoice and lien waiver. The gravamen of Lafayette's argument on this point is that because the June 2010 invoice included the word "final" in its title, Lafayette naturally and justly considered it as an application for Final Payment under the Contract which, in combination with Sparkman's Partial Release of Lien affidavit, dispensed with Crystal Coast's right to charge any amount above $34,000 for work performed under the Contract prior to 23 June 2010, as well as any right to compensation under the Contract for any work performed thereafter. Here again, our review of the record does not support Lafayette's argument. There is no dispute that Crystal Coast's

work on the Project continued for a full year after it submitted the June 2010 invoice, during which time Sparkman consistently and repeatedly made clear to Lafayette that he believed his company was still entitled to compensation under the Contract. Thus, in our view, rather than constituting the intentional relinquishment of a known right, the inclusion of the word "final" in the June 2010 invoice merely reflected the fact that, at the time, both parties expected that the Project would soon be completed. As for the Partial Release of Lien affidavit Sparkman sent along with the June 2010 invoice, given the fact that its scope was expressly limited to the pay period between 1 May 2010 and 30 June 2010, and Burnham's testimony that Sparkman sent similar waivers with each monthly invoice he submitted during Crystal Coast's performance under the Contract, we find it difficult to discern how this document could constitute a full and final waiver of Crystal Coast's right to compensation under the Contract for all past and future work on the Project. Further, even if we agreed with Lafayette that the June 2010 invoice constituted an application for Final Payment, there is no evidence in the record that such an application was ever approved by the Project's Architect, Ron Cox, who testified that he neither signed nor authorized David Thomas to sign the certificate for Final Payment. We therefore find the evidence of Crystal Coast's June 2010 invoice and Sparkman's 23 June 2010 affidavit insufficient to support a jury instruction on waiver.

Lafayette argues further that Crystal Coast waived its rights under the Contract when Sparkman entered into the Mokhiber Agreement on 11 September 2010. Specifically, Lafayette contends that by agreeing to invoice at a rate of only $10,000 per month, Sparkman relinquished his right to charge the full amount provided under the Contract. Our review of the record does not support Lafayette's argument. At trial, Mokhiber testified that his Agreement with Sparkman was contingent on Crystal Coast actually being paid $10,000 per month for eight consecutive months beginning in September 2010, that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract," and that this reservation of rights "was brought up at the original negotiation." However, the evidence introduced at trial demonstrates that Lafayette only made one timely payment under the Mokhiber Agreement in September 2010, followed by two payments in December 2010, and then made no further payments thereafter. Thus, even assuming *arguendo* that the $10,000 monthly fee Crystal Coast was entitled to receive under the Mokhiber Agreement could have sufficed as consideration for a negotiated waiver of its rights under the Contract, because Lafayette failed to perform its obligations under the Mokhiber Agreement

we have no trouble in concluding that this evidence was insufficient to support a jury instruction on waiver. Accordingly, we hold that the trial court did not err in denying Lafayette's request for such an instruction.

(2) Modification

Lafayette also argues that the Mokhiber Agreement constituted evidence of modification, and that the trial court therefore erred in denying Lafayette's request for a jury instruction on modification. However, in light of our holding that the trial court did not err in denying Lafayette's Rule 15 motions to amend its pleadings to add the defense of modification, we hold that the trial court did not err in declining to provide such an instruction to the jury.

(3) Formation

Finally, Lafayette argues that the trial court erred in denying its request for a jury instruction on contract formation. Although the parties stipulated to the Contract's existence, in its appellate brief Lafayette argues that in light of the Contract's express requirement that any amendments be in writing and signed by both parties, and Crystal Coast's arguments at trial that there was never any signed amendment to the Contract, the trial court's failure to instruct the jury that "contracts can be formed through written agreement, oral expressions, or by conduct of the parties; and that contracts with clauses requiring amendments to be signed and in writing can nonetheless be amended by an oral or implied agreement between the parties" created a false impression for the jury that the Contract's terms "could not have been modified by the documentary and testimonial evidence of the [Mokhiber] Agreement." This argument fails, given that by Lafayette's own logic, the primary function of such an instruction would be to re-open the proverbial "back door" on the issue of modification. We have already held that the trial court did not err in denying Lafayette's motions to amend its pleadings to add modification as an affirmative defense and, consequently, that the trial court did not err in denying Lafayette's request for a jury instruction on modification.

Lafayette also argues that the trial court's failure to instruct the jury on formation prevented the jurors from being able to decide whether Crystal Coast breached the implied covenant of good faith and fair dealing that arises in every contract. *See*, *e.g.*, *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985). In its appellate brief, Lafayette contends that Crystal Coast breached this duty by "working on tenant upfit jobs for Crystal Coast's financial benefit with the result that the general site completion was prolonged at Lafayette's expense." When

Lafayette asked for this instruction at trial, the court replied "[t]here's not any evidence of that," and our review of the record confirms the trial court's conclusion. On the one hand, the Contract expressly authorizes Crystal Coast to receive a fee for working on tenant upfits. On the other hand, apart from Burnham's testimony blaming Crystal Coast and Sparkman for virtually everything that went wrong on the Project, the evidence introduced at trial overwhelmingly indicates that the Project's completion was prolonged by an array of factors including Lafayette's financial difficulties, non-conforming work by sub-contractors whose work the Contract expressly made Lafayette itself responsible for, and issues obtaining final permits and approval of the site from the City of Raleigh and the State Department of Transportation which were due at least in part to changes Lafayette made to the plans for the Project against the recommendations of both Sparkman and the Project's architect. The only evidence that Lafayette cites to the contrary in support of its argument are two pages from the transcript of Sparkman's trial testimony in which Lafayette's counsel cross-examined him about the terms of the Contract and suggested that its provision for tenant upfits created a financial incentive for Crystal Coast to drag its feet in completing the Project, which Sparkman denied. Because we find this evidence insufficient to support a jury instruction on formation, we hold that the trial court did not err in denying Lafayette's request.

D. Crystal Coast's motion for attorney fees on appeal

[5] On 30 July 2015, pursuant to Rules 35 and 37 of the North Carolina Rules of Appellate Procedure, Crystal Coast filed motions with this Court to amend the record on appeal to reflect the trial court's 24 October 2014 order and for the imposition of attorney fees on appeal. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, "unless otherwise ordered by the court." N.C.R. App. P. 35(a). "Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal." N.C.R. App. P. 35(c). Assessable costs include "counsel fees, as provided by law." N.C. Gen. Stat. § 7A–305(d)(3) (2013), *amended by* 2015 N.C. Sess. Law 241; *see also R & L Constr. of Mt. Airy, LLC v. Diaz*, __ N.C. App. __, __, 770 S.E.2d 698, 701 (2015).

As noted *supra*, pursuant to N.C. Gen. Stat. § 44A-35, the trial court granted Crystal Coast's motion for attorney fees incurred during trial by order entered 24 October 2014 based on its findings that Crystal Coast was the prevailing party and Lafayette's refusal to resolve the matter was unreasonable. Lafayette did not appeal this order, and has filed

no response to Crystal Coast's motion for attorney fees on appeal. In light of the trial court's unchallenged finding that Lafayette unreasonably refused to resolve this matter, we grant Crystal Coast's motion for attorney fees on appeal and remand the matter to the trial court to take evidence and make appropriate findings concerning the amount of fees to be awarded which were incurred on appeal.

NO ERROR in part; REMANDED in part.

Judges BRYANT and DIETZ concur.

DAVID EASTER-ROZZELLE, EMPLOYEE, PLAINTIFF
v.
CITY OF CHARLOTTE, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA15-594

Filed 1 December 2015

Worker's Compensation—settlement of personal injury claim—without written consent of employer

Plaintiff was barred by the express language of the N.C.G.S. § 97-10.2 and the General Assembly's stated intent from later claiming entitlement to workers' compensation after settling his personal injury claim without the written consent of the employer, a superior court, or Industrial Commission order prior to disbursement of the proceeds of the settlement.

Judge DIETZ concurring.

Appeal by defendant from an opinion and award entered 2 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2015.

Fink & Hayes, P.L.L.C., by Steven B. Hayes, for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

TYSON, Judge.

The City of Charlotte ("Defendant") appeals from the Opinion and Award issued by the North Carolina Industrial Commission in favor of David Easter-Rozzelle ("Plaintiff"). We reverse.

I. Background

Plaintiff was employed by Defendant as a utility technician. On 18 June 2009, Plaintiff sustained injury to his neck and right shoulder while lifting a manhole cover to access a sewer line. Defendant filed a Form 60 in the Industrial Commission admitting liability and compensability for the injury.

Plaintiff was treated by Dr. Scott Burbank at OrthoCarolina for the shoulder injury. On 22 June 2009, Dr. Burbank restricted Plaintiff from work activities until 29 June 2009. Plaintiff continued to experience pain and was unable to perform his job duties on 29 June 2009. He contacted his employer and was instructed to obtain a work restriction note from Dr. Burbank. Dr. Burbank's staff advised Plaintiff to come to the doctor's office to pick up the note.

Plaintiff was involved in an automobile accident while driving to Dr. Burbank's office and sustained a traumatic brain injury. Plaintiff retained an attorney to represent him in a personal injury claim for injuries arising out of the accident. He previously retained different counsel to represent him for his workers' compensation claim.

Plaintiff was transported to the hospital following the automobile accident and asked his wife to contact his supervisor, William Lee. Plaintiff provided his wife with a card containing Mr. Lee's name and contact information. Plaintiff's wife contacted Mr. Lee and informed him that Plaintiff had been involved in an automobile accident on the way to obtain an out-of-work note from Dr. Burbank and could not come to work that day. Plaintiff spoke with Mr. Lee on at least two occasions during the three-day period following his automobile accident. He also informed Mr. Lee that he had been injured in an automobile accident while traveling to Dr. Burbank's office to pick up the note to extend the work restriction. Plaintiff also relayed this information to his safety manager and other employees in Defendant's personnel office.

Plaintiff underwent surgery on his right shoulder on 20 May 2010 and 18 November 2010. On 18 November 2011, Dr. Burbank assigned a 10% permanent partial disability rating to Plaintiff's right shoulder. Dr. Burbank also assigned permanent physical restrictions.

Plaintiff received treatment for traumatic brain injury from Dr. David Wiercisiewski of Carolina Neurosurgery & Spine and Dr. Bruce

Batchelor of Charlotte Neuropsychologists. Dr. Wiercisiewski diagnosed Plaintiff with a concussion and post-concussion syndrome. Both Dr. Wiercisiewski and Dr. Batchelor referred Plaintiff to a psychologist for symptoms of post-traumatic stress disorder, memory loss, and cognitive deficits.

Plaintiff, through counsel, settled his personal injury claim for $45,524.00 on 1 August 2011. After attorney fees, costs, and medical expenses related to the accident were paid from the proceeds of the settlement, Plaintiff received net proceeds of $16,000.00. At the time of disbursement of the settlement proceeds, Plaintiff continued to be represented by separate law firms for the personal injury and workers' compensation claims.

The settlement proceeds were disbursed without either reimbursement to Defendant for its workers' compensation lien or a superior court order reducing or eliminating the lien, and without an Industrial Commission order allowing distribution of the funds. In correspondence to Plaintiff's personal health insurance carrier, his personal injury attorney stated Plaintiff was not "at work" when he sustained the injuries from the automobile accident. Plaintiff's attorney claimed the health insurance carrier was responsible for those medical bills.

The parties mediated Plaintiff's workers' compensation claim on 9 April 2012. During the mediation, the workers' compensation attorney representing Plaintiff became aware the automobile accident had occurred while Plaintiff was driving to Dr. Burbank's office to obtain the work restriction note. Plaintiff's attorney asserted the injuries from Plaintiff's automobile accident should also be covered under Defendant's workers' compensation insurance policy.

Plaintiff's attorney suspended the mediation and filed a Form 33 request for hearing on 31 January 2013. Defendant denied the claim based upon estoppel and because the settlement proceeds from the automobile accident were disbursed without Industrial Commission approval or release by the superior court.

The matter was heard before the Deputy Commissioner on 11 December 2013. The Deputy Commissioner concluded that under *Hefner v. Hefner Plumbing Co., Inc.*, 252 N.C. 277, 113 S.E.2d 565 (1960), Plaintiff had no right to recover additional compensation from Defendant for the injuries arising out of the automobile accident. The Deputy Commissioner concluded Plaintiff had settled with and disbursed the funds from a third party settlement without preserving Defendant's lien, or applying to a superior court judge or the Commission to reduce

or eliminate the lien. The Deputy Commissioner also concluded Plaintiff was estopped from contending he is entitled to benefits under the Workers' Compensation Act.

Plaintiff appealed to the Full Commission, and the matter was heard on 15 August 2014. The Commission found the injuries Plaintiff sustained in the automobile accident on 29 June 2009 were causally related to Plaintiff's shoulder injury, and are compensable as part of Plaintiff's shoulder injury claim. The Commission further found Plaintiff provided Defendant with sufficient notice of the automobile accident and his injuries.

The Commission concluded the Supreme Court of North Carolina's decision in *Hefner* is inapplicable to facts and law of this case, and *Hefner* does not preclude Plaintiff from pursuing benefits under the Workers' Compensation Act. The Commission further determined Plaintiff is not judicially nor equitably estopped from recovery under the Workers' Compensation Act for injuries related to his automobile accident. The Commission determined Defendant is entitled to a statutory lien on recovery from the third party proceeds Plaintiff had received from settlement of his personal injury claim when the subrogation amount is determined by agreement of the parties or a superior court judge. Defendant appeals from the Full Commission's Opinion and Award.

II. Issues

Defendant argues the Full Commission erred by concluding: (1) the Supreme Court's decision in *Hefner* is not applicable to this case to prevent Plaintiff's recovery under the Workers' Compensation Act for injuries he sustained in the third party automobile accident; (2) Plaintiff is not barred from recovery under the Act by principles of estoppel; and (3) Defendant maintained a subrogation lien and suffered no prejudice from Plaintiff's settlement with the third party tortfeasor.

III. Standard of Review

This Court reviews the Industrial Commission's conclusions of law *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). Under a *de novo* standard of review, this Court considers the matter anew and can freely substitute its legal conclusions for those of the Commission. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92 614 S.E.2d 351, 353 (2005) (citing *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)), *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

IV. Right to Recovery under the Workers' Compensation Act

Defendant argues the Commission erred in concluding the Supreme Court's decision in *Hefner* is inapplicable to the facts of this case. We agree.

In *Hefner*, the plaintiff was injured in an automobile accident during the course and scope of his employment. The plaintiff's counsel advised the workers' compensation insurance carrier that the plaintiff was pursuing a claim against the third party tortfeasor and was "making no claim for Workmen's Compensation benefits at this time." 252 N.C. at 279, 113 S.E.2d at 566.

The plaintiff's attorney in *Hefner* kept the workers' compensation insurance carrier informed of the status of the plaintiff's injuries and of developments in the negotiations with the third party tortfeastor. *Id.* at 278, 113 S.E.2d at 566. The plaintiff reached a settlement agreement with the third party tortfeasor and the settlement funds were disbursed without providing for the workers' compensation lien. *Id.*

Following settlement, the plaintiff filed a claim with the Industrial Commission. *Id.* He argued that, although he had specifically chosen to settle with the third party tortfeasor, the workers' compensation carrier should be ordered to pay a proportionate part of his attorney fees in the third party matter. The Supreme Court stated:

> This is the determinative question on this appeal: May an employee injured in the course of his employment by the negligent act of a third party, after settlement with the third party for an amount in excess of his employer's liability, and after disbursement of the proceeds of such settlement, recover compensation from his employer in a proceeding under the Workmen's Compensation Act. In light of the provisions of the Act as interpreted by this Court, the answer is 'No.'

Id. at 281, 113 S.E. 2d 568.

Here, the Full Commission concluded:

> The Supreme Court specifically stated in *Hefner* that the Court based its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which *restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor*. The Supreme Court in

> *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case. *Hefner v. Hefner Plumbing Co., Inc*, 252 N.C. 277, 113 S.E.2d 565 (1960).

(Emphasis supplied).

The Opinion and Award contains error and a misstatement of law with regard to the Court's holding in *Hefner*. The *Hefner* rationale does not hold that, under the former statute, the injured employee was restricted from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Court in *Hefner* recognized the former statute, N.C. Gen. Stat. § 97-10, permitted the plaintiff to recover compensation under the Workers' Compensation Act and seek damages from the third party tortfeasor. *Id.* at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where the employee pursues his remedy against the employer and against the third party, *a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party*." (emphasis supplied)).

The provision of the Workers' Compensation Act, which formerly required the injured employee to elect between pursuing a remedy against the employer versus the third party tortfeasor, was eliminated by the 1933 amendment of the Act. *Whitehead & Anderson, Inc. v. Branch*, 220 N.C. 507, 510, 17 S.E.2d 637, 639 (1941). The *Hefner* opinion was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor under N.C. Gen. Stat. § 97-10.

Defendant argues that under the holding in *Hefner*, Plaintiff may not ignore the disbursement provisions of the Workers' Compensation Act and thereafter attempt to recover benefits from the employer under the Act. The *Hefner* case was determined under N. C. Gen. Stat. § 97-10, which was repealed by Session Laws 1959, c. 1324.

The current version of the statute, N.C. Gen. Stat. § 97-10.2, sets forth the rights and interests of the parties when the employee holds

a common law cause of action for damages against a third party tortfeasor. N.C. Gen. Stat. § 97-10.2 (a) (2013). The statute gives both the employer and the employee the right to proceed against, and make settlement with, the third party. N.C. Gen. Stat. § 97-10.2(b) and (c) (2013). The statute provides:

> (h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. *Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:*
>
> (1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or
>
> (2) If either party follows the provisions of subsection (j) of this section.

N.C. Gen. Stat. § 97-10.2(h) (2013) (emphasis supplied).

Pursuant to subsection (j) of the statute, following the employee's settlement with the third party, either the employee or the employer may apply to a superior court judge to determine the subrogation amount. N.C. Gen. Stat. § 97-10.2(j) (2013). "After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien." *Id.*

When a case is settled pursuant to subsection (j), our Supreme Court has held that the employer must still give written consent pursuant to subsection (e). *Pollard v. Smith*, 324 N.C. 424, 426, 378 S.E.2d

771, 773 (1989). Defendant's mandatory right to reimbursement under N.C. Gen. Stat. § 97-10.2 (e) is not waived by failure to admit liability or obtain a final award prior to distribution of the third party settlement proceeds. *Radzisz v. Harley Davidson*, 346 N.C. 84, 90, 484 S.E.2d 566, 569-70 (1997).

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Id.* at 89, 484 S.E.2d 566, 569 (1997) (citation omitted). By enacting N.C. Gen. Stat. § 97-10.2(e) and (j), the General Assembly clearly intended for the employer to have involvement and consent in the settlement process, including allocation and approval of costs and fees, and determination of the employer's lien. Allowing the employee to settle with the third party tortfeasor, determine the allocation, distribute funds, and later claim entitlement to workers' compensation benefits would eviscerate the statute's intent.

Plaintiff argues the *Hefner* holding is distinguishable because the settlement in that case involved an amount in excess of the employer's liability under the Workers' Compensation Act. Here, Plaintiff asserts he recovered "an amount grossly inadequate" to cover his medical bills and lost wages. This distinction is insignificant. Regardless of the amount of the settlement, the employer was not provided an opportunity to participate in the settlement or allocation of its disbursement by its providing written consent. Also, neither the superior court nor the Commission had a role in determining the respective rights or obligations of the parties.

In *Pollard v. Smith*, the plaintiff, a highway patrolman, was injured in an automobile accident while on duty. *Pollard*, 324 N.C. at 425, 378 S.E.2d at 772. The North Carolina Department of Crime Control and Public Safety paid workers' compensation benefits to the plaintiff. The plaintiff then settled with the third party without the Department's consent to the settlement. *Id.* Also, without any notice to the Department, the plaintiff petitioned the superior court for an order distributing the funds. The superior court ordered that all proceeds from the settlement be paid to the plaintiff. *Id.*

The Supreme Court held "[t]he settlement . . . is *void* because it does not comply with N.C.G.S. § 97-10.2(h) in that the Department did not give its written consent to the settlement." *Pollard*, 324 N.C. at 426, 378 S.E.2d at 771 (emphasis supplied); *accord Williams v. International Paper Co.*, 324 N.C. 567, 380 S.E.2d 510 (1989) (holding a settlement

reached by the parties without the written consent of the employer is void). Plaintiff argues that under *Pollard* and *Williams*, the settlement should be treated as void, rather than bar recovery under the Act. Plaintiff asserts the correct remedy is to void the settlement and allow the superior court to determine the amount, if any, of Defendant's lien. If any amount is due Defendant, Plaintiff asserts future payment can be deducted from benefits due to Plaintiff. We disagree.

Plaintiff's claims against the third party tortfeasor are not before this Court. The difference between this case and *Pollard* and *Williams*, is both those cases involved appeals from the superior court's order allowing the settlements to be disbursed. The settlements had not been disbursed without the court's or Commission's approval.

Here, the settlement was agreed to, paid, allocated and disbursed without notice to Defendant and prior to Plaintiff's later claim for entitlement to workers' compensation benefits. Initial and oral notice of the accident to Defendant does not satisfy the required statutory written notice of the claim and consent to the settlement or disbursement. The statute specifically prohibits either party from entering into a settlement or accepting payment from the third party without written consent of the other. N.C. Gen. Stat. 97-10.2(h).

Plaintiff's assertion does not consider or align with the legislative purpose of N.C. Gen. Stat § 97-10.2(h) to allow Defendant to participate in the settlement process by requiring review and written consent to the settlement. Allowing Defendant to recoup its lien from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant.

In light of the requirement of N.C. Gen. Stat. § 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here. Where an employee is injured in the course of his employment by the negligent act of a third party, settles with the third party, and proceeds of the settlement are disbursed in violation of N.C. Gen. Stat. § 97-10.2, the employee is barred from recovering compensation for the same injuries from his employer in a proceeding under the Workers' Compensation Act. *Hefner*, 252 N.C. at 281, 113 S.E. 2d 568.

In light of our holding, we need not address the applicability of principles of judicial and equitable estoppel. By the express language of the statute and the General Assembly's stated intent, Plaintiff is precluded from recovering workers' compensation benefits under the Act for injuries arising from the automobile accident after excluding Defendant

from the settlement allocation and disbursement of proceeds. *Id.* Plaintiff's arguments are overruled.

V. Conclusion

Plaintiff is barred from later claiming entitlement to compensation under the Workers' Compensation Act after settling his claim with the third party tortfeasor without the written consent of the employer in violation of N.C. Gen. Stat. § 97-10.2, or an order from the superior court or the Commission, prior to disbursement of the proceeds of the settlement. The Industrial Commission erred in finding and concluding Plaintiff was entitled to workers' compensation benefits under these facts. The Commission's Opinion and Award is reversed.

REVERSED.

Judges McCULLOUGH concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, Concurring.

This case presents a hornbook example of the doctrine of quasi-estoppel. Under the Workers' Compensation Act, an employee who is injured by a third party in the course of his employment cannot settle and collect payment from the tortfeasor without (1) the written consent of the employer; (2) an order from a superior court judge setting the amount of the employer's lien on the settlement payment; or (3) paying the employer the full amount of its claimed lien as part of the settlement. *See* N.C. Gen. Stat. § 97-10.2(h),(j).

By settling his tort claim and receiving a substantial settlement payment without doing any of these things, Easter-Rozzelle received a benefit: the immediate receipt of money that, had he treated the claim as one subject to the Workers' Compensation Act, likely would have been split with—or paid entirely to—his employer.

The acceptance of this benefit invokes the doctrine of quasi-estoppel. Easter-Rozzelle had a choice—either follow the statutory procedure for settling a tort claim that also gives rise to a compensable workers' compensation injury, or treat the subsequent injury as an ordinary tort claim not subject to the statutory provisions. Easter-Rozzelle chose the latter. As a result, he received the benefit of a settlement not subject to employer approval, and a settlement check not subject to a workers'

compensation lien. Later, Easter-Rozzelle took a plainly inconsistent position by asserting that his injury was, in fact, subject to the Workers' Compensation Act despite having just settled the claim in a manner that indicated it was not.

"Quasi-estoppel 'has its basis in acceptance of benefits' and provides that '[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.' " *Carolina Medicorp, Inc. v. Bd. of Trustees of State of N.C. Teachers' & State Employees Comprehensive Major Med. Plan*, 118 N.C. App. 485, 492, 456 S.E.2d 116, 120 (1995).

I would hold that, by entering into a settlement with the tortfeasor that treated his injury claim as one not subject to the Workers' Compensation Act, Easter-Rozzelle is estopped from later seeking benefits under the Act for that same injury. Of course, Easter-Rozzelle can continue to receive his workers' compensation benefits for his underlying shoulder injury—the one that sent him to meet with his doctor on the day of the accident. But I would hold that quasi-estoppel precludes Easter-Rozzelle from asserting that the injuries sustained *in the accident* are compensable under the Workers' Compensation Act because Easter-Rozzelle chose to receive the benefits of an up-front settlement payment from the tortfeasor that treated those injuries as if they were not subject to the Act.

JASMINE MANISH GANDHI, PLAINTIFF
v.
MANISH ISHWARLAL GANDHI, DEFENDANT

No. COA15-328

Filed 1 December 2015

1. Divorce—equitable distribution—distributive award—contempt

The trial court did not err in denying plaintiff's motion for contempt in an equitable distribution action where two options were given for a distributive award. Defendant made a $50,000 payment under protest pursuant to option two in order to remain in compliance with a consent order.

2. Divorce—equitable distribution—deadline—extension—Rule 6(b)

The trial court erred as a matter of law in an equitable distribution action by extending a deadline in a consent order pursuant to Rule 6(b). The deadline was not a time period specified in the Rules of Civil Procedure.

3. Divorce—separation—bargained agreement—modification

A consent judgment that incorporates the bargained agreement of the parties and provisions of a court-adopted separation agreement may be modified within certain carefully delineated limitations. Although the trial court here attempted to reach an equitable result, the trial court could not *sua sponte* "exercise its judgment to alter" the consent order. The only motion that defendant made was an oral motion pursuant to Rule 6(b) after both parties' closing arguments at a contempt hearing a year and one-half after entry of the consent order.

Appeal by plaintiff from Order entered 12 November 2014 by Judge Anne E. Worley in Wake County District Court. Heard in the Court of Appeals 21 September 2015.

SMITH DEBNAM NARRON DRAKE SAINTSING & MYERS, L.L.P., by John W. Narron and Alicia Jurney, for plaintiff.

GAILOR HUNT JENKINS DAVIS & TAYLOR, PLLC, by Stephanie J. Gibbs, for defendant.

ELMORE, Judge.

Jasmine Manish Gandhi (plaintiff) appeals from the trial court's Order denying her motion for contempt, granting Manish Ishwarlal Gandhi's (defendant) oral motion for extension of time pursuant to Rule 6(b), and concluding that defendant's conduct constituted excusable neglect. After careful consideration, we reverse the trial court's Order and remand.

I. Background

The parties were married on 3 April 1994, separated on 27 August 2009, and divorced on 16 February 2011. On 24 February 2012, the trial court entered an "Agreement and Consent Order and Judgment on Equitable Distribution" (consent order) resolving all issues raised by the parties in connection with their equitable distribution claims. Stipulation

number two states, "[T]he parties waive further formal Findings of Fact and Conclusions of Law . . . and nevertheless agree that this Consent Order and Judgment shall be binding upon them the same as if entered by a District Court Judge after a hearing on the merits of all matters now pending." In paragraph 1(e), the court ordered that "[a] cash distributive award of $590,000.00 or $700,000 as more particularly described in paragraph 3 below" be distributed to plaintiff.

Paragraph 1(f) states,

> No later than five (5) days after Plaintiff receives $400,000 from Defendant on the Distributive Award, Plaintiff shall remove Defendant's name from any and all debt she incurred for which Defendant is liable including but not limited to the SunTrust debt account numbers ending 1280 and 1256 or pay the entire balance in full on both accounts and close the accounts[.]

Paragraph 3 provides defendant with two different payment options:

> As referred to in Paragraph 1 of this decretal, the Defendant shall pay to the Plaintiff a Distributive Award in Equitable Distribution, (in addition to the other transfers of property [to] the Plaintiff provided for herein) in the total amount of $700,000.00 if paid within (3) years or $590,000 if paid within Thirty (30) days which shall be payable as follows:
>
> a. Within 30 days of the entry of this Consent Order and Judgment, Defendant will pay the Plaintiff $590,000. If he is not able to pay the Plaintiff $590,000 within 30 days, he will pay the Plaintiff $700,000 with such payment to be made as follows:
>
> 1. Within 30 days of the entry of this Consent Order and Judgment the Defendant will pay to the Plaintiff the cash sum of $400,000.00.
>
> 2. Within 3 years of the entry of this Consent Order and Judgment the Defendant will pay to the Plaintiff the cash sum of $300,000.00, payable as follows:
>
> 2.1. First $50,000 payable on or before February 15, 2013.
>
> 2.2. Second $50,000 payable on or before February 15, 2014.

> 2.3. Remaining $200,000 payable on or before February 15, 2015.

On 20 March 2012, defendant paid plaintiff $400,000. Prior to entry of the consent order, defendant applied for an equity line of credit in the amount of $200,000 in order to pay the remaining $190,000 owed within thirty days under option number one. The closing date for the line of credit was scheduled for 22 March 2012, and the thirty-day deadline under option number one (the deadline) was 26 March 2012. Less than two days before the closing date, defendant learned that he would not receive $200,000, as requested, and instead he would receive only $164,000. In order to pay the remainder due under option number one, defendant borrowed $26,000 from his brother but he did not receive the funds until after the deadline.

On 3 April 2012—eight days after the deadline—defendant's attorney e-mailed plaintiff informing her that "the remaining $190,000 installment payment on the $590,000 distributive award option" was available and "[w]e are authorized to release the $190,000 payment to you upon your execution of the attached notice of satisfaction." Additionally, defendant's attorney stated that defendant had not received documentation showing his name had been removed from the SunTrust debt accounts as provided in paragraph 1(f) of the consent order. Plaintiff was unwilling to sign the satisfaction. Defendant's attorney sent plaintiff a letter on 22 June 2012 stating that, to date, plaintiff refused to pick up the $190,000 check that had been available since 3 April 2012 and that it would remain available until 29 June 2012. The letter provided that if plaintiff did not claim the check by 29 June 2012, defendant would assume plaintiff did not intend to accept the payment. Plaintiff did not pick up the check.

Plaintiff filed a motion for order to show cause in district court on 25 February 2013 asking the court to require defendant "to appear and show cause why he should not be held in contempt for failing to comply with a prior order of this court dated February 24, 2012." The district court entered an order on 15 March 2013 ordering defendant to appear and show cause why the court should not hold him in contempt. On 20 August 2013, defendant delivered to plaintiff a letter and a $50,000 check, pursuant to option number two under paragraph 3(a)(2.1), "made under protest in response to the Motion for Order to Show Cause." The letter further stated,

> [Defendant] maintains his position that he substantially complied with the Agreement and Consent Order and

> Judgment on Equitable Distribution, entered February 24, 2012, by attempting to pay the remaining $190,000 on April 3, 2012, of the total $590,000 due, and that [plaintiff's] refusal to accept his check for $190,000 on that date was an unreasonable and calculated effort to force him to pay her an additional $110,000. Nonetheless, because [defendant] does not want to be held in contempt, he is making a payment of $50,000 to [plaintiff]. [Defendant] reserves his right to a hearing on the question of whether the payment he already tendered for $190,000 was and is valid, and he reserves all rights in that regard.

The parties appeared for a hearing on 26 August 2013, and on 12 November 2014, the district court entered an Order containing the following conclusions of law:

> 1. It would be inequitable to disallow Defendant to pay under Option Number 1 solely because Defendant was a mere eight days late (and six business days late) in tendering the $190,000 under Option Number 1.
>
> 2. That the Defendant's failure to pay $590,000 as a distributive award within 30 days of the entry of the ED Judgment was the result of excusable neglect within the meaning of Rule 6(b) of the North Carolina Rules of Civil Procedure.
>
> 3. The Defendant is entitled to an extension of time to perform under Option Number 1 through and including April 3, 2012, the date that Defendant tendered the $190,000.
>
> 4. It is equitable and appropriate for the Court, in its discretion, to extend the deadline under Option Number 1 as set forth in the Order below.
>
> 5. The Defendant is not in contempt of this Court.
>
> 6. Defendant is entitled to a dollar for dollar credit for the $50,000 payment made under protest to the Plaintiff referred to in paragraph 19 of the Findings of Fact above and for any similar payment that has been made to Plaintiff since the August 26, 2013 hearing on this matter.
>
> 7. Neither party is entitled to attorney's fees associated with Plaintiff's Motion to Show Cause.

Plaintiff appeals.

II. Analysis

A. Motion for Contempt

[1] Plaintiff first argues that the trial court erred in determining that defendant was not in civil contempt because (1) the consent order remains in force; (2) its purpose may still be served by compliance with it; (3) defendant's noncompliance was willful; and (4) defendant clearly had the ability to comply with the order, citing N.C. Gen. Stat. § 5A-21 (2013). Defendant argues that the trial court properly found he was not in contempt because the evidence supports the trial court's findings of fact, which in turn support its conclusions of law. Defendant argues the evidence showed he made all reasonable efforts to pay plaintiff $590,000 before the option number one deadline, and he paid $50,000 under protest pursuant to option number two in order to remain in compliance with the consent order.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citing *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)) (quotations omitted). "North Carolina's appellate courts are deferential to trial courts in reviewing their findings of fact." *Id.* (quoting *Harrison v. Harrison*, 180 N.C. App. 452, 454, 637 S.E.2d 284, 286 (2006)) (quotations omitted).

N.C. Gen. Stat. § 5A-21 provides,

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable

> measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21 (2013). "Civil contempt is inappropriate where a defendant has complied with the previous court orders prior to the contempt hearing." *Watson*, 187 N.C. App. at 67, 652 S.E.2d at 319 (citing *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 190 (1976) (concluding that the defendant purged himself of any possible contempt by paying the amount owed after the plaintiff filed the motion but before the hearing on the motion)).

Regarding civil contempt, the trial court made the following finding of fact:

> 19. In August, 2013, prior to this hearing on Plaintiff's Motion to Show Cause, Defendant made a $50,000 payment to Plaintiff under protest, which, had this Court determined that Option Number 2 applied, would have brought him in compliance with the ED Judgment. When making that payment, Defendant expressly reserved and did not waive his right to continue to take the position that Option Number 1 applied and that the Court should allow him the additional 8 days grace period/extension of time as set forth herein to pay under Option Number 1.

It then concluded, "Defendant is not in contempt of this Court."

Because defendant made a $50,000 payment under option number two, albeit "under protest," he complied with the consent order prior to the contempt hearing and, thus, civil contempt is inappropriate. *See Watson*, 187 N.C. App. at 67, 652 S.E.2d at 319; *Hudson*, 31 N.C. App. at 551, 230 S.E.2d at 190. Therefore, the trial court did not err in denying plaintiff's motion for contempt.

B. Rule 6(b) Motion for Extension of Time

[2] Plaintiff argues, "Rule 6(b) allows the trial court to extend the time for a party to do an act required to be done pursuant to the Rules of Civil Procedure[.]" Plaintiff maintains that Rule 6(b) does not permit the trial court to amend a final order, and that "[a] final judgment or order may only be altered or amended by the trial court based on a proper motion or notice and the grounds set out in Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure." Defendant claims the trial court had the authority to grant defendant's motion for an extension of time pursuant to Rules 6(b) and 7 of the North Carolina Rules of Civil Procedure.

Rule 6(b) provides,

> (b) Enlargement.—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2013).

This Court recently stated, "As an initial matter, *the only* time periods that may be extended based upon the authority available pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b), are those established by the North Carolina Rules of Civil Procedure." *Glynne v. Wilson Med. Ctr.*, ___ N.C. App. ___, ___, 762 S.E.2d 645, 651–52 (Sept. 2, 2014) (COA14-53), *review dismissed by agreement*, 367 N.C. 811, 768 S.E.2d 115 (2015) (emphasis added) (citing *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 108, 493 S.E.2d 797, 801 (1997) (stating that "our courts have consistently held that a trial court's authority to extend the time specified for doing a particular act [pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b)] is limited to the computation of [those] time period[s] prescribed by the Rules of Civil Procedure")); *see also Lemons v. Old Hickory Council*, 322 N.C. 271, 277, 367 S.E.2d 655, 658 (1988) (holding "that pursuant to Rule 6(b) our trial courts may extend the time for service of process under Rule 4(c)"); *Riverview Mobile Home Park v. Bradshaw*, 119 N.C. App. 585, 587–88, 459 S.E.2d 283, 285 (1995) (holding that the magistrate did not have the authority under Rule 6(b) to extend the time for plaintiff to pay the filing fees because the time limitation was not contained in the Rules of Civil Procedure but was found in N.C. Gen. Stat. § 7A-228); *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 80, 193 S.E.2d

362, 365 (1972) ("Rule 6(b) is applicable to enlargement of time for filing pleadings, motions, interrogatories, the taking of depositions, etc.").

Based on our appellate courts' decisions regarding the scope of Rule 6(b), the trial court erred as a matter of law in extending the deadline in the consent order pursuant to Rule 6(b) because the deadline was not a time period specified in our Rules of Civil Procedure. Because the trial court did not have authority to enlarge the time period under Rule 6(b), we need not address the excusable neglect prong of the analysis.

C. Modification of Consent Order

[3] Defendant argues that "assuming for the sake of argument that the trial court actually 'modified' the Consent Judgment, the court had the inherent authority to do so pursuant to the rule set forth in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983)." Defendant states, "Plaintiff was bound by *Walters* to expect that the court could—for reasons of law or equity—exercise its judgment to alter the unsatisfied distributive-award provision of the parties' Consent Judgment to allow for, among other circumstances, a bank delay that the Plaintiff knew about." Plaintiff contends that under *Walters*, a party may not seek modification of a property settlement provision. Plaintiff maintains, "If an equitable distribution order is entered by consent, the judge may not amend the judgment absent consent of both parties or proof that (1) consent was not given, or (2) the judgment was obtained by mutual mistake or fraud."

"A consent judgment incorporates the bargained agreement of the parties." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990). In *Walters v. Walters*, our Supreme Court attempted to eliminate "great confusion in the area of family law" regarding consent judgments. 307 N.C. at 386, 298 S.E.2d at 342. It stated,

> As an order of the court, the court adopted separation agreement is enforceable through the court's contempt powers. This is true for all the provisions of the agreement since it is the court's order and not the parties' agreement which is being enforced. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964); *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982). In addition to being enforceable by contempt, the provisions of a court ordered separation agreement within a consent judgment are modifiable within certain carefully delineated limitations. As the law now stands, if the provision in question concerns alimony, the issue of modifiability is determined by

> G.S. 50-16.9. However, if the provisions in question concern some aspect of a property settlement, then it may be modified only so long as the court's order remains unsatisfied as to that specific provision. "An action in court is not ended by the rendition of a judgment, but in certain respects is still pending until the judgment is satisfied." *Abernethy Land and Finance Co. v. First Security Trust Co.*, 213 N.C. 369, 371, 196 S.E. 340, 341 (1938); *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967). Therefore, property provisions which have not been satisfied may be modified.
>
> . . . .
>
> These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. at 385–86, 298 S.E.2d at 341–42.

Under *Walters*, provisions of a court-adopted separation agreement may be modified within certain carefully delineated limitations. *See*, *e.g.*, N.C. Gen. Stat. § 50-16.9(a) (2013) ("An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."). In *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), this Court discussed the modifiability of consent judgments:

> A motion to amend a judgment must be made within ten days after entry thereof. G.S. 1A-1, R. Civ. P. 59(e). A motion for relief from a judgment on grounds of mistake, inadvertence, surprise, or excusable neglect must be made within one year. R. Civ. P. 60(b). A motion to correct clerical mistakes may be made at any time, however. R. Civ. P. 60(a).

Notably, here, the only motion that defendant made was an oral motion pursuant to Rule 6(b) after both parties' closing arguments at the contempt hearing on 26 August 2013—a year and a half after entry of the consent order. Whether defendant could have successfully made other motions to amend the consent order is not an issue now before this Court, and we reject defendant's argument that the trial court could *sua sponte* "exercise its judgment to alter" the consent order.

Additionally, as plaintiff notes,

> Defendant had the opportunity to bargain for a later due date for the distributive award payment, to include language authorizing the trial court to grant an extension of time for him to make the payment, or to include a provision stating that he would not be liable for the additional $110,000.00 due under Option 2 if the delay in making the $590,000.00 payment due under Option 1 was caused by problems obtaining financing. Defendant did none of these things. Defendant instead failed to make the payment owed under Option 1 by the due date and then asked the trial court to modify the terms of the ED Order so that he would not have to comply with the provisions of Paragraph 3, which expressly contemplated that Defendant might not meet the Option 1 deadline and specifically imposed a penalty on Defendant if that occurred.

Moreover, paragraph 1(f) of the consent order states, "No later than five (5) days after Plaintiff receives $400,000 from Defendant on the Distributive Award, Plaintiff shall remove Defendant's name from any and all debt she incurred[.]" The trial court's Order indicates that defendant did not pay plaintiff the $400,000 until 20 March 2012, six days before the deadline. Plaintiff testified at the contempt hearing that upon receiving the $400,000 she went to the bank to pay off the two loans. She stated, "even though it is a cashier's check, they have to wait, especially because of the amount of the check . . . they had to wait a period of time for it to go through[.]" Plaintiff testified that as soon as the funds were credited to her account she paid off the loans.

Although defendant was relying on the equity line of credit from BB&T, he stated at the contempt hearing that, prior to signing the consent order, he knew the joint equity lines at SunTrust were still open with a $120,000 balance. He noted, "And that was the major reason why BB&T would not approve, because there were two lines open in my name liable on those notes for $120,000, and they said they could not approve me more than $164,000." Defendant was aware of this financial situation prior to agreeing to the consent order, but he stated, "I kind of did not anticipate that that would cause a problem[.]" Although the trial court attempted to reach an equitable result, its conclusions of law cannot stand.

III. Conclusion

The trial court did not err in denying plaintiff's motion for contempt. The trial court did err in granting defendant's motion for extension of time pursuant to Rule 6(b). We reverse the trial court's Order and remand so the trial court can enter a new order requiring defendant to comply with option number two of the consent order.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

CHARLES JEFFREY HILL, PLAINTIFF
v.
DAWN SANDERSON (HILL), DEFENDANT

No. COA15-79

Filed 1 December 2015

1. Divorce—equitable distribution—equity line of debt—findings of fact

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals held that the trial court erred by classifying $25,000 of the equity line debt, which was valued at $42,505.10, as Husband's separate debt. Since the Certificate of Satisfaction in the record indicated that the amount of the equity line debt satisfied in 2000 was $25,000.00, the evidence in the record did not support the trial court's finding that the $35,000.00 equity line debt, in its entirety, was "transferred or rolled into the current [$100,000.00] equity line." The Court of Appeals vacated the portion of the judgment pertaining to the equity line debt and remand the matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented and to classify, value, and distribute the equity line debt in accordance with its findings.

2. Divorce—equitable distribution—earnings held by corporation

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court erred by finding that Wife "earned income as an

officer of the [S] corporation" beginning in 2011 but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings were still held by the corporation and so were not marital property.

3. Divorce—equitable distribution—valuation of property—not supported by evidence

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the evidence in the record did not support the trial court's valuation of the Fairway Drive property at $45,000. The finding rested upon Wife's testimony, in which she stated, "I really don't have knowledge of that kind of stuff."

4. Divorce—equitable distribution—passive loss of value

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the passive loss of value of the parties' one-half interests in two properties located on Water Rock Terrace in Asheville, North Carolina.

5. Divorce—equitable distribution—proceeds from sale of real property

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the proceeds from the sale of the real property located on Gaston Mountain Road in Asheville, North Carolina. The Court of Appeals remanded the matter to the trial court to classify and distribute the one half interest in the property acquired by the parties after the date of separation.

6. Divorce—equitable distribution—finding—inconsistent with parties' stipulations

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court's finding regarding the valuation of Husband's 401(k) account was inconsistent with the parties' stipulations.

7. Divorce—equitable distribution—tax consequences—issue not challenged at hearing

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals rejected Husband's argument that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the

court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. The issue was raised at the hearing, and Husband declined to challenge it.

8. Divorce—equitable distribution—payments on mortgage debt

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife.

9. Divorce—equitable distribution—distributional factors—not abuse of discretion

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered.

10. Divorce—equitable distribution—N.C.G.S.§ 50-20(b)(4)(d) —2013 amendments

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C.G.S. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments.

Appeal by Plaintiff from judgment entered 11 September 2014 by Judge Julie M. Kepple in District Court, Buncombe County. Heard in the Court of Appeals 12 August 2015.

Mary Elizabeth Arrowood for Plaintiff–Appellant.

No brief for Defendant–Appellee.

McGEE, Chief Judge.

Plaintiff Charles Jeffrey Hill ("Husband") appeals from an amended judgment ordering the unequal division of the marital estate that Husband shares with Defendant Dawn Sanderson Hill ("Wife"). We affirm the judgment in part, and vacate and remand in part.

I. Facts and Procedural History

Husband and Wife (collectively "the parties") were married on 3 August 1996, separated on 6 July 2009, and divorced on 8 September 2010. Two children ("the children") were born during the course of the marriage; one child in 2003 and one child in 2007. Husband filed a complaint on 19 August 2009 seeking custody of the children and equitable distribution of marital property. Wife answered and counterclaimed for child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. The parties stipulated to the classification, valuation, and distribution of certain enumerated marital assets, and the trial court entered its judgment on equitable distribution on 5 March 2012.

This Court considered Husband's appeal from the trial court's 5 March 2012 judgment on equitable distribution in *Hill v. Hill* (*Hill I*), __ N.C. App. __, 748 S.E.2d 352 (2013). In *Hill I*, this Court vacated portions of the trial court's 5 March 2012 judgment on equitable distribution after determining that the trial court "erred in failing to classify property, in the valuation of property, and in considering a distributional factor that was based on an erroneous finding." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 355.

Upon remand from this Court, the trial court recognized that it was to consider the following issues:

> (1) classify the corporation as marital or separate property and distribute the corporation as well as the dividend[;] (2) classify the equity line as marital, separate or mixed and distribute marital portion, if any[;] (3) determine the amount of post separation payments and classify as divisible property[;] (4) distribute the credit card debt[;] (5) classify, value and distribute the vehicles and bank accounts[;] (6) determine the distributional factors and determine if unequal division is equitable[;] (7) determine the fair market value of undeveloped lots[;] (8) determine the fair market value of marital residence[; and] (9) determine the net value of the marital estate and percentages to each party[.]

After hearing the matter on 25 July 2014, the trial court entered an amended equitable distribution judgment on 11 September 2014 in which the trial court concluded that an unequal division of the marital estate was equitable, and distributed twenty-five percent of the marital estate to Husband and seventy-five percent of the marital estate to Wife. The trial court ordered Husband to pay Wife a distributive award in the amount of $20,968.63. Husband appeals.

II. Standard of Review

"Upon application of a party for an equitable distribution, the trial court shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20]." *Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202 (1993) (omission and alteration in original) (internal quotation marks omitted), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). "In so doing, the court must conduct a three-step analysis." *Id.* "First, the court must identify and classify all property as marital[, divisible,] or separate based upon the evidence presented regarding the nature of the asset." *Id.*; *see also Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (providing that the first step of equitable distribution is for the trial court to "classify property as being marital, divisible, or separate property"). "Second, the court must determine the net value of the marital [and divisible] property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances." *Smith*, 111 N.C. App. at 470, 433 S.E.2d at 202. "Third, the court must distribute the marital [and divisible] property in an equitable manner." *Id.* at 470, 433 S.E.2d at 203.

"The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property — collectively termed distributable property — in order that a reviewing court may reasonably determine whether the distribution ordered is equitable." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 357 (internal quotation marks omitted). "[T]o enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted). "In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted). "Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court

to determine what was done and its correctness." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted).

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination." *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (internal quotation marks omitted). "The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Lawing v. Lawing*, 81 N.C. App. 159, 163, 344 S.E.2d 100, 104 (1986). "Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision." *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (internal quotation marks omitted); *see also Wiencek–Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) ("Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with [N.C. Gen. Stat. § 50-20(c)] will establish an abuse of discretion." (citations omitted)).

III. Arguments

A. Equity Line Debt

[1] Husband first contends the trial court erred by classifying $25,000.00 of the equity line debt — valued at $42,505.10 as of the date of separation — as Husband's separate debt. We agree.

In *Hill I*, this Court recognized that "[t]he parties had stipulated that there was a Wachovia (now Wells Fargo) equity line debt, secured by [Husband's] separate real property, of $42,505.10 [at] the date of separation. The parties did not stipulate to the classification of this debt." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 359. Because "[t]he trial court's findings seem[ed] to indicate that to some extent the equity line debt was incurred as [Husband's] separate debt (for [a] vehicle purchase prior to the marriage), and to some extent for marital purposes," *id.* at __, 748 S.E.2d at 359, this Court vacated the portion of the 5 March 2012 judgment pertaining to the equity line debt with instructions that, on remand, the trial court should "determine whether this was a marital debt, a separate debt, or partially marital and partially separate." *Id.* at __, 748 S.E.2d at 360.

Upon remand, the trial court made the following findings with respect to the equity line debt:

57. The parties have an equity line with a balance as of the date of separation of the parties of $42,505.10. This equity line is secured by the separate real property of [Husband] located in Burke County, NC. The parties have stipulated to this finding of fact.

58. The equity line was opened in July 1996 with First Union Bank and only in the name of [Husband]. The notation for the first check written on the equity line was for a 1994 Ford Explorer vehicle purchased by [Husband]. This was prior to the marriage of the parties and thus the separate debt of [Husband].

59. The equity line was modified to increase it to $35,000.00 in 1999 with First Union Bank. This modification was only in the name of [Husband]. There was no competent evidence that the equity line with First Union for $35,000.00 was paid off but only that it was transferred or rolled into the current equity line with Wachovia that is now Wells Fargo. The $25,000.00 equity line opened in 1996 was satisfied on June 27, 2000.

60. . . . In 2003, the parties established an equity line for $100,000.00 and at the date of separation of the parties the balance was $42,505.10. . . .

61. With the exception of the $25,000.00 equity line, and the modification to $35,000.00 of said equity line, all of the debts related to the equity line were incurred for the benefit of the parties' marriage to purchase various real properties or improve the properties. . . .

62. The equity line is a mixed asset with $25,000.00 attributed to the separate debt of [Husband]. The marital portion of the equity line is the remaining balance as of the date of separation, $42,505.10 minus $25,000.00, or $17,505.10.

After considering Husband's and Wife's respective post-separation payments on the equity line debt as distributional factors, the trial court then distributed the marital portion of the debt to Husband.

There is competent evidence in the record to support the trial court's finding that the $25,000.00 equity line debt, opened in July 1996, was

Husband's separate debt, since it was incurred in Husband's name and was secured by Husband's separately-owned Burke County real property prior to the marriage of the parties in August 1996. "Separate property" is "all real and personal property acquired by a spouse *before* marriage." N.C. Gen. Stat. § 50-20(b)(2) (2013) (emphasis added). Since there is no dispute that the 1996 equity line debt was incurred prior to the marriage, Husband's protestations that such debt should have been classified as marital because this equity line was opened when the parties were living together and was used to purchase a vehicle that was used during the marriage are not relevant to the trial court's determination.

There was also competent evidence in the record to support the trial court's findings that: the $25,000.00 equity line opened in 1996 was satisfied on 31 May 2000; that Husband and Wife together established an equity line with Wachovia, now Wells Fargo, for $100,000.00 in September 2003, which was secured by the same Burke County real property that secured the then-satisfied $25,000.00 equity line; and that, per the parties' stipulation, the balance on the $100,000.00 equity line established in 2003 was $42,505.10 as of the date of separation.

However, in apparent contradiction to its finding that the $25,000.00 equity line was satisfied in 2000, the trial court further found that $25,000.00 of the $42,505.10 balance on the equity line debt was attributable to Husband's separate debt. Nonetheless, this Court has previously determined that "[a] reduction in the separate debt of a party to a marriage, caused by the expenditure of marital funds, is, in the absence of an agreement to repay the marital estate, neither an asset nor a debt of the marital estate." *Adams v. Adams*, 115 N.C. App. 168, 170, 443 S.E.2d 780, 781 (1994). Since the trial court found that Husband's separate debt from the 1996 equity line in the original amount of $25,000.00 was satisfied during the course of the marriage, and since there was no indication in the record that there was any agreement between the parties that Husband was to repay that satisfaction amount to the marital estate, if Husband's then-satisfied equity line debt of $25,000.00 was to be considered by the trial court, it could only have been properly considered as a distributional factor within the context of N.C. Gen. Stat. § 50-20(c)(12). *See Adams*, 115 N.C. App. at 170, 443 S.E.2d at 781.

The trial court also found that the original $25,000.00 equity line was increased to $35,000.00 in 1999 "only in the name of [Husband]," and that there was "no competent evidence that the equity line . . . for $35,000.00 was paid off but only that it was transferred or rolled into the current equity line with Wachovia that is now Wells Fargo." Since the Certificate of Satisfaction in the record indicates that the amount of the equity line

debt satisfied in 2000 was $25,000.00, the evidence in the record did not support the trial court's finding that the $35,000.00 equity line debt, in its entirety, was "transferred or rolled into the current [$100,000.00] equity line." Therefore, we vacate the portion of the trial court's judgment pertaining to the equity line debt, and remand this matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented, and to classify, value, and distribute the equity line debt in accordance with its findings.

B. Corporate Income

[2] The trial court found, and Husband does not dispute, that the parties "stipulated that the corporate dividends for 2009 and 2010 of $35,000.00 for Speaking Of, Inc., [we]re marital property and that said dividends [we]re distributed to [Wife]." However, Husband contends there was no competent evidence to support Finding of Fact 68, in which the trial court found as follows: "In 2011 to the current date, [Wife] continued to singly operate Speaking Of, Inc., and is the sole stockholder for said corporation. Beginning in 2011, to the current date, [Wife] earned income as an officer of the corporation and did not have stock dividends." Husband asserts evidence was presented that Speaking Of, Inc. ("the corporation") continued to "earn dividends" post-separation in the amount of $38,052.00 in 2011, $39,136.00 in 2012, and $37,948.00 in 2013, that these amounts were paid to Wife as "non-salary distributions," and that these corporate earnings from 2011 through 2013 were not classified or properly distributed by the trial court.

Profits of a Subchapter S corporation, referred to as "retained earnings," are "owned by the corporation, not by the shareholders." *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005). However, for a Subchapter S corporation, "net taxable income [is] passed along to the shareholders in proportion to their respective stock interests, and the [c]ompany [is not] required to pay corporate income tax." *See Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 194, 517 S.E.2d 178, 182, *disc. review denied*, 351 N.C. 101, 541 S.E.2d 142 (1999). Instead, "[i]ncome tax is paid by the shareholders, rather than the corporation, and income is *allocated* to shareholders based upon their proportionate ownership of stock." *Allen*, 168 N.C. App. at 375, 607 S.E.2d at 336 (emphasis added). Nevertheless, "retained earnings of a corporation are not marital property until *distributed* to the shareholders," *id.* (emphasis added), and "funds received after [a] separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation." *Id.* at 374, 607 S.E.2d at 335.

In *Hill I*, this Court considered whether the trial court erred by failing to classify two distributions from the corporation to Wife in 2009 and 2010 as marital property. *Hill I*, __ N.C. App. at __, 748 S.E.2d at 358. Although the record before this Court in *Hill I* did not include the corporation's articles of incorporation, amendments to the articles, stock certificates, or corporate tax returns that were admitted as Husband's exhibits, *id.* at __, 748 S.E.2d at 357, the record reflected that "[i]ncome for the corporation was created by the work of [Wife] as a speech pathologist," and that this income was distributed to Wife by the corporation in the following two ways: first, Wife was paid a small salary; and second, Wife received a larger non salary distribution, which was not subject to withholding taxes. *Id.* at __, 748 S.E.2d at 358. Based upon this evidence, the trial court found that "certain distributions" included on the corporation's tax returns were "*not dividends but* merely reflect[ed] the corporation's *method of paying a salary* to the officer of the corporation," *id.* at __, 748 S.E.2d at 358 (emphases added) (internal quotation marks omitted), where Wife "received a small amount of income as wages, and the balance as a distribution to her without tax withholding." *Id.* at __, 748 S.E.2d at 358 (internal quotation marks omitted). Nevertheless, this Court determined that, if the trial court concluded upon remand that the corporation was a marital asset, this finding was in error because the trial court "recharacterized a shareholder distribution as salary to [Wife]," *id.* at __, 748 S.E.2d at 358, and the parties were "bound by their established methods of operating the corporation," since the shareholder distributions were used to "avoid payment of federal withholding taxes." *Id.* at __, 748 S.E.2d at 358. Thus, since "[t]he retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property," this Court, in *Hill I*, determined that, if the corporation was marital, the $35,000.00 in distributions "would be marital property," but instructed that the trial court could "consider how this income was generated as a distributional factor" under N.C. Gen. Stat. § 50-20(c)(1) and (12). *Id.* at __, 748 S.E.2d at 358.

In the present case, the record before us includes the corporation's income tax returns for the calendar years 2011, 2012, and 2013, as well as Wife's individual tax returns for those same years. Each corporate tax return in the record indicates that Wife owns 100% of the stock in the corporation. The corporation's ordinary business income for 2011, 2012, and 2013 was $38,052.00, $39,136.00, and $37,948.00, respectively. Wife's individual tax returns for those same years indicate that the same amounts were reported by Wife as nonpassive income from the corporation. However, neither the corporation's tax returns nor Wife's tax returns for those years indicate that the corporation issued dividends or

other distributions to Wife, or that Wife received any dividends or salary from the corporation. In other words, based on the evidence in the record before us, the amounts claimed as nonpassive income by Wife, who was the sole shareholder for the corporation in 2011, 2012, and 2013, remain retained earnings in the corporation and have not been distributed as earned income to Wife as an officer of the corporation. The evidence also supports the trial court's finding that Wife did not receive stock dividends in 2011, 2012, and 2013. Since "retained earnings of a[n S] corporation are not marital property until *distributed* to the shareholders," *see Allen*, 168 N.C. App. at 375, 607 S.E.2d at 336 (emphasis added), and the evidence in the record before us does not indicate that the corporation's retained earnings were distributed to Wife in 2011, 2012, or 2013, we conclude that the trial court erred by finding that Wife "earned income as an officer of the corporation" beginning in 2011, but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings are still held by the corporation and so are not marital property.

C. The Fairway Drive Property

[3] Husband next contends the trial court's finding of fact regarding the valuation of the undeveloped lot located on Fairway Drive in Weaverville, North Carolina, ("the Fairway Drive property"), which the parties stipulated was marital property, was not supported by the evidence presented. Specifically, Husband asserts there was no competent evidence to support the trial court's finding that the fair market value of the Fairway Drive property as of the date of separation was $45,000.00. We agree.

"[L]ay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion." *Finney v. Finney*, 225 N.C. App. 13, 16, 736 S.E.2d 639, 642 (2013) (internal quotation marks omitted). "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value." *Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204 (2001) (internal quotation marks omitted). "[T]here is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property." *Id.* at 361, 551 S.E.2d at 205. "Rather, an owner is deemed to have sufficient knowledge of the price paid [for his land], the rents or other income received, and the possibilities of the land for use, [and] to have a reasonably good idea of what [the land] is worth." *Id.* (alterations in original) (internal quotation marks omitted).

"The [trial] court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted." *Brooks v. Brooks*, 12 N.C. App. 626, 628–29, 184 S.E.2d 417, 419 (1971) (internal quotation marks omitted).

In *Hill I*, the trial court found that the fair market value of the Fairway Drive property as of the date of separation was $35,000.00. *Hill I*, __ N.C. App. at __, 748 S.E.2d at 362. At the time of the hearing, the Fairway Drive property had been listed for sale for six years, beginning in 2006, and the trial court valued the lot based upon its listing price. *Id.* at __, 748 S.E.2d at 363. In *Hill I*, this Court held that the "listing price for real property is nothing more than the amount for which the parties would like to sell the property[, and i]t has no bearing upon the fair market value of the property, which is the amount that the trial court is required to determine for equitable distribution." *Id.* at __, 748 S.E.2d at 363. "Since the propert[y] ha[d] been for sale since 2006 . . . with no buyers, [this Court determined that] it [wa]s clear that the listing price was not indicative of the fair market value of the property," and so vacated the portion of the equitable distribution judgment valuing the Fairway Drive property, and remanded the matter to the trial court for further proceedings on this issue. *Id.* at __, 748 S.E.2d at 364.

Upon remand, the trial court considered the following testimony offered by Wife regarding the value of the Fairway Drive property as of the date of separation:

> Q What did you believe at the date of separation — let me ask you this just for recall. You separated in July of 2009; is that correct?
>
> A Yes.
>
> Q What do you believe the fair market value of [the Fairway Drive property] was in 2009?
>
> A I can't — do you have the listing? I can't even remember how much we were listing it for. I believe it was lower than the listing, but I don't remember.
>
> . . . .
>
> Q So at the date of separation, what did you believe that Fairway Drive lot was valued at?

A I think about 45 or — at the date of separation, it was more under my impression from what I had been told. I really don't have knowledge of that kind of stuff.

Q Do you recall purchasing Fairway Drive?

A Yes.

Q Do you recall how much you paid for it?

A Forty-nine thousand.

Q When was it purchased?

A I don't have that with me, I apologize.

Q Do you just recall the year?

A Somewhere around maybe 2005. I honestly — I apologize.

Based upon this testimony, the trial court made the following findings of fact with respect to the value of the Fairway Drive property as of the date of separation:

20. The parties purchased the lot in 2005 for $49,000.00 with the intention of reselling the property for a profit. The property was on the market for sale for approximately seven years with two offers to purchase.

21. The fair market value of Fairway Drive as of the date of separation of the parties was $45,000.00 based upon the opinion of [Wife,] which she formed from the purchase price of the property, the decline in the overall market from the date of purchase, the listing price for the property over the years, discussions with realtors and other lots for sale in the neighborhood and the loss [Husband] has claimed on the property on his individual income taxes for 2013. . . .

22. [Husband] testified that in his opinion the fair market value of the property as of the date of separation was $20,000.00. There was no credible evidence offered to the Court as to how [Husband] arrived at his opinion of the value of the property except that the property had not sold while on the market for seven years.

Husband argues that the trial court's findings concerning the valuation of the Fairway Drive property as of the date of separation were not based upon the evidence presented.

As we recognized above, it is generally held that a property owner is competent to testify as to the value of his or her property "*[u]nless* it affirmatively appears that the owner does not know the market value of his property." *See Goodson*, 145 N.C. App. at 361, 551 S.E.2d at 204 (emphasis added) (internal quotation marks omitted). Although Wife presented competent evidence that the purchase price of the Fairway Drive property was $49,000.00, Wife's testimony did not support the trial court's finding with respect to the property's fair market value as of the date of separation. When asked what she believed to be the date of separation value of the Fairway Drive property, after trying to remember the listing price — which this Court held was "not indicative of the fair market value of the property," *see Hill I*, __ N.C. App. at __, 748 S.E.2d at 364 — Wife said: "I think about 45 or — at the date of separation, it was more under my impression from what I had been told. *I really don't have knowledge of that kind of stuff*." (Emphasis added.) After reviewing Wife's testimony as to her opinion regarding the fair market value of the Fairway Drive property as of the date of separation, we conclude that the evidence in the record did not support the trial court's valuation of the property at $45,000.00 as of the date of separation. Therefore, we vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Fairway Drive property.

D. The Water Rock Properties

[4] Husband next contends the trial court failed to properly distribute the passive loss of value of the parties' one-half interests in two properties located on Water Rock Terrace in Asheville, North Carolina ("the Water Rock properties"). We agree.

As of the date of separation, the parties owned one-half interests in the Water Rock properties, which the parties stipulated were marital property. The parties purchased the Water Rock properties in 2007 for $88,250.00 with the intention of reselling them. Wife gave opinion testimony that, based on the purchase price of the properties, the challenges with respect to the development of the land, her conversations with the realtor, and the current market, the value of the Water Rock properties as of the date of separation was $80,000.00, and that the value of the parties' one-half interests was $40,000.00. As of the date of separation, there was also a lien on the Water Rock properties in the amount

of $45,852.25. Wife gave further opinion testimony that, based on information provided to her by the realtor regarding "percentages of drops in vacant properties and what was sold around there or not sold," the fair market value for the Water Rock properties as of the date of distribution was $72,000.00, and the value of the parties' one-half interests was $36,000.00. In 2012, the deeds for the Water Rock properties were returned to the mortgage lender in lieu of foreclosure.

The trial court valued the Water Rock properties in accordance with Wife's opinion testimony, and found that the passive loss of value of the Water Rock properties since the date of separation was divisible property. The trial court ordered that, although the deeds for the Water Rock properties "ha[d] been relinquished to the lender in lieu of foreclosure on the properties," the "marital half interest[s] in these two properties [we]re distributed to [Husband] at the fair market value of $40,000.00," and Husband "shall be solely entitled to any and all tax deductions or losses he may be able to claim for said properties." However, in its equitable distribution judgment, the trial court indicated that the value of the Water Rock properties was "$36,000.00 (net 0)," but did not distribute the passive loss in accordance with its earlier findings. Therefore, we vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Water Rock properties, and remand this matter to the trial court for further consideration of this issue in light of this opinion.

E. The Gaston Mountain Property

[5] Husband next contends the trial court failed to properly distribute the proceeds from the sale of the real property located on Gaston Mountain Road in Asheville, North Carolina ("the Gaston Mountain property"). We agree.

As of the date of separation, the parties together owned a one-half interest in the Gaston Mountain property, which the parties stipulated was marital property. Wife gave opinion testimony that, based on the purchase price of the property, the location of the property, the development in the area, and her conversations with the realtor, the value of the Gaston Mountain property in its entirety as of the date of separation was $80,000.00. As of the date of separation, there was also a lien on the Gaston Mountain property in the amount of $45,552.25.

Additionally, although the parties together owned a one half interest in the Gaston Mountain property as of the date of separation, at trial, Husband testified as follows:

> Q Subsequent to the last hearing, did the person who owned the other one half interest [in the Gaston Mountain property] take some action regarding this property?
>
> A He did. He was a joint owner and carried the only debt on the property. He had financial hardship, and his lender on his primary residence could not refinance or modify his loan while he maintained an ownership in any other property within the square mile calculation they had. So he asked to be removed. He processed a quitclaim deed for that, and he agreed to walk away from that without any additional compensation just to be able to retain his primary residence.

Based on this evidence, the trial court found that "[t]he third party owner of this property relinquished his ownership interest to [Husband] and [Wife] *after the date of separation of the parties*. There was [sic] no funds exchanged between the third party owner and [Husband] and [Wife] herein for the relinquishment." (Emphasis added.)

The trial court then found that the fair market value for the Gaston Mountain property as of the date of distribution in 2014 was $60,500.00, which was the price for which the property was sold in 2012. The trial court further found that the net proceeds of the sale for the Gaston Mountain property were $6,782.11. However, the trial court then concluded that the fair market value of the "marital half interest" was $30,250.00, but distributed the $6,782.11 in proceeds from the sale, in their entirety, to Wife. The record before us indicates that only one half of the Gaston Mountain property was acquired during the course of the marriage and was, therefore, marital property. Thus, if the later-acquired, one half interest of the Gaston Mountain property was not marital property and the only portion of the proceeds subject to distribution was the portion derived from the sale of the marital interest in the property as of the date of separation, the trial court erred by distributing the entire $6,782.11 proceeds from the sale of the Gaston Mountain property to Wife. However, since "funds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation," *see Allen*, 168 N.C. App. at 374, 607 S.E.2d at 335, we remand this matter to the trial court to classify and distribute the one half interest in the Gaston Mountain property acquired by the parties after the date of separation.

F. Valuation of Retirement Accounts

[6] Husband next contends the trial court's finding regarding the valuation of Husband's 401(k) account was inconsistent with the parties' stipulations. We agree.

In the final equitable distribution pretrial order preceding the 11 September 2014 amended equitable distribution judgment from which Husband appeals, the trial court found that "[t]he parties stipulate[d] that all retirement, 401(k), pension and similar financial accounts should be considered with a tax impact of twenty percent (20%) in the [trial c]ourt's final determination of the balances of accounts for distribution to the parties." The trial court made the following finding with respect to these accounts:

> The following retirement accounts are marital assets per prior stipulations of the parties. The parties stipulated to the twenty percent tax impact of said accounts and the Court distributes the accounts as follows:
>
> a. [Husband] shall receive as his separate property:

401(k)	$46,940.49	(less 20%) $40,552.39
Wachovia Cash Acct	$3,325.01	(less 20%) $ 2,660.01
IRA in name of Husband	$26,249.97	(less 20%) $20,999.98

b. [Wife] shall receive as her separate property:

IRA, held in name of Wife	$2,388.99	(less 20%) $1,911.19
IRA, held in name of Wife	$4,884.63	(less 20%) $3,907.70

Each of the net fair market values found by the trial court for these retirement accounts corresponded to the net fair market values to which the parties stipulated. However, the value attributed to Husband's 401(k), less the stipulated twenty-percent "tax impact," was not mathematically correct: $46,940.49 less twenty percent is $37,552.39, not $40,552.39. Nevertheless, in its equitable distribution judgment, the trial court correctly valued the amounts to be distributed for each of these retirement accounts in accordance with the parties' stipulations and its findings, and indicated that the value of Husband's 401(k), less twenty percent of the total for tax impact, was $37,552.39. Since the trial court's findings reflect that it intended to distribute the net fair market value of the parties' respective retirement, 401(k), pension and similar financial

accounts, less the twenty percent tax impact, upon remand for other issues, we instruct the trial court to correct the mathematical error reflected in its Decretal Paragraph 13 with regard to the amount to be distributed to Husband from his 401(k).

G. Distributive Factor Regarding Tax Consequences for Retirement Accounts

[7] Husband next contends the trial court "ignore[d]" the parties' pre-trial stipulations concerning the valuation of the marital retirement and pension accounts by attributing, under the designation "Tax impact not likely to be incurred," $15,330.09 to Husband and $1,454.73 to Wife in its distributional factors — which corresponded to the twenty-percent tax impact amounts the parties had stipulated to deducting from the net fair market valuations of the retirement and pension accounts — and used these values in determining that Wife was entitled to a distributive award. Husband asserts the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. We disagree.

"Courts do not have authority to change provisions of an order which affect the rights of the parties without notice and an opportunity for hearing." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 107, 730 S.E.2d 784, 793 (2012). "Just as a party requesting to set aside a stipulation would have to give notice to the opposing parties, and the opposing parties would have an opportunity for hearing upon the request," *id.* at 108, 730 S.E.2d at 793 (citation omitted), "the trial court cannot [on] its own motion set aside a pre trial order containing the parties' stipulations after the case has been tried in reliance upon that pre-trial order, without giving the parties notice and an opportunity to be heard." *Id.* (internal quotation marks omitted).

At trial, after the parties presented their respective evidence as to the valuation, classification, and distribution of the marital property, the trial court heard the parties' arguments regarding the distributional factors set forth in N.C. Gen. Stat. § 50-20(c). With respect to the trial court's consideration of the tax consequences to each party, the parties' respective counsel brought forth the following argument:

> BY [WIFE'S COUNSEL] MS. VARDIMAN:
> Your Honor, in regard to Factor 11 which are the tax consequences, I believe the parties have already stipulated in

> the final pretrial order of the 20 percent tax impact. We would ask the Court, Your Honor, to consider those tax consequences and the likelihood of whether or not that they would occur. Under the factors, Your Honor, it's not only the tax consequences, but the likelihood of whether or not they occur. It's specifically listed in the statute that the Court may consider that. It's our contention, Your Honor, that even though there may be a 20 percent tax impact in consideration of distribution of retirement monies, I don't believe, Your Honor, that there would be any tax consequences or any likelihood of items being sold or having to be liquidated. So I believe there is a very low likelihood of any of these tax consequences occurring. Anything, Ms. Arrowood, in regard to 11? . . .
>
> BY THE COURT:
> Do you have anything else to add to that?
>
> BY [HUSBAND'S COUNSEL] MS. ARROWOOD:
> Your Honor, I don't.

Thus, Wife's counsel brought forward this issue for the trial court's consideration at the hearing, and Husband's counsel raised no objection to the contention and, when invited by the court to do so, Husband's counsel declined to be heard on the matter. Because the issue was raised at the hearing and Husband declined to challenge the issue, we must overrule this issue on appeal.

H. The Sunnybrook Property

[8] Husband contends the trial court erroneously awarded Wife a "double credit" for the $45,424.55 reduction in the mortgage debt that had occurred since the date of separation on the real property located at 46 Sunnybrook Drive, in Asheville, North Carolina ("the Sunnybrook property"). Husband asserts that Wife received a double credit when the court both (1) distributed the Sunnybrook property to Wife for a net market value reflecting the mortgage reduction amount that resulted in an increase in the valuation of the home, and (2) credited Wife for her post-separation mortgage payments on the property as a distributional factor. We disagree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576–77

(2002). "To accommodate post-separation payments, the trial court may treat the payments as distributional factors under section 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments." *Id.* at 731, 561 S.E.2d at 577 (citation omitted). "If the property is distributed to the spouse who did not have . . . post-separation use of it or who did not make post-separation payments relating to the property's maintenance (i.e. taxes, insurance, repairs), the use and/or payments must be considered as either a credit or distributional factor." *Id.* at 732, 561 S.E.2d at 577. "If, on the other hand, the property is distributed to the spouse who had . . . post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor." *Id.* "Nonetheless, the trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances." *Id.*

Husband directs our attention to *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993). In *Smith*, the trial court gave the husband full credit for his post-separation payments that resulted in the discharge of a second mortgage that had a balance due of $189,956.00 on the marital home, which home was distributed to the husband. *See id.* at 508, 433 S.E.2d at 225. The court further stated that "to avoid a double treatment of [the husband's] discharge of the second mortgage, which increased the net value of the home as of the date of trial by $189,956, the court was going to subtract that amount from the post[ ]separation appreciation attributed to this asset." *Id.* On appeal, this Court determined that, by giving the husband "a full credit for his discharge of the second mortgage," the trial court "reimbursed [him] in full for his expenditure towards that debt and restored him to the position he would have been in, monetarily, had he not made any payments towards that debt, thereby putting the parties on equal footing with respect to that debt and asset." *Id.* at 511, 433 S.E.2d at 227. However, "[the husband's] discharge of the second mortgage increased the net value of the marital home as of the date of trial by $189,956, which increase inured to the benefit of [the husband] since he was awarded the home." *Id.* Since the husband "received the benefit of that increase in value by the distribution of the home to him, [this Court determined that the wife] was entitled to have that increase taken into consideration by the court in determining an equitable distribution." *Id.* at 511–12, 433 S.E.2d at 227. "[B]ecause the court did not include the amount of the second mortgage in the total of the post[ ]separation appreciation of the marital property, thereby depriving [the wife] of the benefit from the increase in value of the home to which she was entitled," *id.* at 512, 433 S.E.2d at 227, this Court

remanded the matter with the instruction that, on remand, the trial court "should either include the $189,956 in the post[ ]separation appreciation considered by it in determining what division [wa]s equitable, or explain more fully in its findings of fact how deletion of this amount from the post[ ]separation appreciation d[id] not result in a double credit to [the husband]." *See id.*

In the present case, the parties stipulated that the Sunnybrook property was marital property with a fair market value of $375,000.00 as of the date of separation, and a fair market value of $405,000.00 as of the date of the hearing. The trial court also found, and Husband does not dispute, that: (1) Wife has "continuously occupied" the property since the date of separation and currently resides there with the children; (2) the net market value of the Sunnybrook property as of the date of separation was $375,000.00, less the mortgage debt on the property as of the date of separation totaling $366,513.30, or $8,486.70; (3) Wife made post separation mortgage payments on the Sunnybrook property totaling $92,174.32, and Husband made post separation mortgage payments on the Sunnybrook property totaling $8,832.00; (4) the net market value of the Sunnybrook property as of the date of the hearing was $405,000.00, less the mortgage debt on the property as of the date of the hearing totaling $321,088.75, or $83,911.25; (5) the trial court distributed the Sunnybrook property to Wife at the net market value of $83,911.25; and (6) the trial court included among its distributive factors Wife's payments of $92,174.32 and Husband's payments of $8,832.00 as credits for Wife and Husband, respectively, toward "preserv[ing] the marital estate after the separation of the parties by paying mortgages, taxes, home owner association fees and insurance on the parcels of real estate as they became due."

Thus, in addition to crediting Wife for her mortgage payments as a distributive factor, the trial court distributed to Wife the Sunnybrook property with a net market value of $83,911.25. As Husband recognizes in his brief, this value reflects the following: the $30,000.00 passive increase in value of the property from $375,000.00 as of the date of separation to $405,000.00 as of the date of the hearing; the $8,486.70 net value of the property as of the date of separation; and the $45,424.55 reduction in the mortgage debt on the property from $366,513.30 as of the date of separation to $321,088.75 as of the date of the hearing. Thus, as in *Smith*, by giving Wife credit for her mortgage payments on the Sunnybrook property as a distributive factor, "the court reimbursed [Wife] in full for [her] expenditure towards that debt and restored [her] to the position [s]he would have been in, monetarily, had [s]he not made any payments

towards that debt, thereby putting the parties on equal footing with respect to that debt and asset." *See Smith*, 111 N.C. App. at 511, 433 S.E.2d at 227. However, unlike *Smith*, the trial court took the increase in the value of the Sunnybrook property into consideration in determining equitable distribution because the amount of Wife's mortgage payments, which increased the net value of the marital home, were included in the total of the post-separation appreciation of the property. *Cf. id.* at 508, 433 S.E.2d at 225. Accordingly, we conclude the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife. Thus, we overrule this issue.

I. The Distributive Award

[9] Husband next contends the trial court abused its discretion by ordering the payment of a distributive award. Husband asserts the trial court "fail[ed] to state a finding sufficient to indicate its basis for entering a distributive award." We disagree.

N.C. Gen. Stat. § 50-20(e) provides that "it shall be presumed in every action that an in kind distribution of marital or divisible property is equitable," and that "[t]his presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind." N.C. Gen. Stat. § 50-20(e). "[I]f the trial court determines that the presumption of an in kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004). "In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties," and "may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property." N.C. Gen. Stat. § 50-20(e); *see also* N.C. Gen. Stat. § 50-20(b)(3) ("[A 'd]istributive award' [is defined as] payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.").

In the present case, after the trial court made twelve findings corresponding with at least nine of the twelve distributional factors set forth in N.C. Gen. Stat. § 50-20(c), the court concluded that "[a]n unequal division of the marital estate [wa]s equitable considering the distributional

factors set forth [in the equitable distribution judgment]." After reviewing the record, we conclude the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered.

J. Divisible Property and the 2013 Amendments to N.C. Gen. Stat. § 50-20(b)(4)(d)

[10] Effective 1 October 2013, the General Assembly amended the definition of "divisible property" set forth in N.C. Gen. Stat. § 50-20(b)(4)(d) to provide that such property specifically includes "*[p]assive* increases and *passive* decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(4)(d) (emphases added); *see also* 2013 N.C. Sess. Laws 208, 208–09, ch. 103, §§ 1, 2. In his final issue on appeal, Husband suggests that the trial court may have erroneously classified "active increases" in marital debt as divisible property for post-separation payments made on or after 1 October 2013. While we agree with Husband that only passive increases and decreases in marital debt on or after 1 October 2013 should have been classified as divisible property by the trial court, Husband does not identify which, if any, divisible property was so erroneously classified. Our review of the amended equitable distribution judgment in its entirety reflects that the trial court only classified two properties as divisible: "[t]he passive reduction in the value of the [Fairway Drive] property since the date of separation;" and "[t]he passive loss of value of the [Water Rock properties] since the date of separation." Because Husband does not direct our attention to any property that was classified by the trial court as divisible in contravention of the 2013 amendments to N.C. Gen. Stat. § 50-20(b)(4)(d), and because the only property we found that was classified and distributed as divisible by the trial court was by passive decreases, we conclude the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C. Gen. Stat. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments. Accordingly, we overrule this issue.

IV. Conclusion

In sum, we vacate the portion of the trial court's judgment pertaining to the equity line debt, and remand this matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented, and to classify, value, and distribute the equity line debt in accordance with its findings. We conclude that the trial court erred

by finding that Wife "earned income as an officer of the corporation" beginning in 2011, but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings are still held by the corporation and so are not marital property. We vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Fairway Drive property. We vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Water Rock properties, and remand this matter to the trial court for further consideration of this issue in light of this opinion. We remand this matter to the trial court to classify, value, and distribute the one half interest in the Gaston Mountain property acquired by the parties after the date of separation. We instruct the trial court to correct the mathematical error reflected in its Decretal Paragraph 13 with regard to the amount to be distributed to Husband from his 401(k). We overrule Husband's contention that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts. We conclude that the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife. We conclude the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered. Finally, we conclude the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C. Gen. Stat. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments.

We further conclude that the remaining issues on appeal for which Husband failed to provide adequate legal support are deemed abandoned. *See* N.C.R. App. P. 28(a).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and DAVIS concur.

IN RE F.C.D.

[244 N.C. App. 243 (2015)]

IN THE MATTER OF F.C.D., A JUVENILE

No. COA15-577

IN THE MATTER OF M.B., A JUVENILE

No. COA15-578

Filed 1 December 2015

1. Child Abuse, Dependency, and Neglect—cruel or grossly inappropriate procedures to modify behavior

The trial court did not err by adjudicating petitioner-mother's minor child as an abused juvenile pursuant to N.C.G.S. § 7B-101(1) (in which a caretaker "[u]ses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or . . . devices to modify behavior"). The trial court's findings, which were supported by evidence in the record, established that the child was forced to sleep outside on at least two cold nights in February, was bound to a tree, was required to participate in "self-baptism" in a bathtub full of water, was ordered to pray while petitioner's boyfriend or roommate (Robert) brandished a firearm, was struck with a belt all over his body, and was repeatedly told by petitioner and Robert that he was possessed by demons.

2. Child Abuse, Dependency, and Neglect—abused child—placement of parent on Responsible Individuals List

The trial court did not err by placing petitioner-mother on the Responsible Individuals List when it adjudicated her son as abused and seriously neglected. Petitioner was not deprived of her right to due process of law because she was represented by an attorney, who presented evidence, cross-examined witnesses, and made arguments that petitioner's placement on the List would be improper. The trial court's conclusion that petitioner should be placed on the List was supported by its finding that she had abused her son.

3. Child Abuse, Dependency, and Neglect—abuse of another child in the home—injurious environment

The trial court did not err by adjudicating petitioner-father's child (Faye) to be a neglected juvenile. Even though Faye herself was not abused, petitioner and his girlfriend or roommate abused another child in the home—and Faye witnessed the abuse. Faye

therefore lived an injurious environment and faced a substantial risk of physical, mental, or emotional impairment.

Appeal by respondents from orders entered 11 February 2015 by Judge Sarah C. Seaton in Sampson County District Court. Heard in the Court of Appeals 9 November 2015.

Warrick, Bradshaw and Lockamy, P.A., by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Richard Croutharmel for respondent-appellant R.D.

Rebekah W. Davis for respondent-appellant M.B.

Parker Poe Adams & Bernstein LLP, by Kiah T. Ford IV, for guardian ad litem for F.C.D.

Cranfill Sumner & Hartzog LLP, by Jennifer A. Welch, for guardian ad litem for M.B.

DAVIS, Judge.

Respondent R.D. ("Robert")[1] appeals from the trial court's 11 February 2015 orders in file number 14 JA 24 adjudicating his daughter F.C.D. ("Faye") to be a neglected juvenile and ordering that she remain in the legal custody of the Sampson County Department of Social Services ("DSS"). Respondent M.B. ("Melanie") appeals from separate orders entered on 11 February 2015 in file number 14 JA 25 adjudicating her son M.B. ("Michael") to be an abused and neglected juvenile and ordering that he remain in the legal custody of DSS and in his current placement with his maternal grandmother. After careful review, we affirm.

Factual Background

In early 2014, Melanie and Michael resided with Robert and Faye at Robert's home in Godwin, North Carolina. While both Melanie and Robert maintained that they were merely friends, Melanie's friends and coworkers described the relationship between Melanie and Robert as a dating relationship.

1. Pseudonyms are used throughout the opinion to protect the identity of the minor children involved in this matter and for ease of reading. N.C.R. App. P. 3.1(b).

On 10 March 2014, DSS filed two juvenile petitions alleging that (1) Faye was a neglected juvenile; and (2) Michael was an abused and neglected juvenile. Both petitions stated that DSS had received a report of potential abuse and neglect involving Faye and Michael on 27 February 2014. According to the report, Robert had told Michael that Michael was "possessed with demons" and had forced Michael to (1) sleep outside on a cold night; (2) sit on a chair blindfolded and pray that God would rid him of the demons; and (3) "baptize" himself by submerging his body in a bathtub filled with water and repeating "Lord just wash me and cleanse me" seven times. DSS alleged that the "methods of discipline" that had been inflicted on Michael in Faye's presence were "cruel and grossly inappropriate, which created an injurious environment for [Faye]." DSS obtained nonsecure custody of both juveniles on 7 March 2014. Faye was placed in foster care, and Michael was placed with his maternal grandmother, "Beth."

On 18 September 2014, DSS filed supplemental juvenile petitions concerning both Faye and Michael. The petitions stated that DSS had received a report that Michael had also previously been "kicked, tied to a tree, hit with a sock with soap in it and . . . forced to sleep outside" and that Faye had been "exposed to this behavior." Additionally, the petitions noted that a Child and Family Evaluation conducted with Robert, Melanie, and both children yielded "findings of neglect in the form of injurious environment regarding [Faye]" and "findings of emotional abuse and neglect regarding [Michael]."

The trial court held adjudication and disposition hearings for both Faye and Michael on 29 October 2014. During the hearings, the trial court also addressed Melanie's and Robert's petitions seeking judicial review of DSS's determinations that each was a "responsible individual" as defined by N.C. Gen. Stat. § 7B-101(18a). On 11 February 2015, the trial court entered orders (1) adjudicating Faye a neglected juvenile and Michael an abused and neglected juvenile; (2) concluding that Melanie and Robert were responsible individuals based on its determination that both had abused and seriously neglected Michael; and (3) directing DSS to place Melanie and Robert on the Responsible Individuals List pursuant to N.C. Gen. Stat. § 7B-311.

Melanie and Robert appeal from the trial court's orders concerning their respective children. Because the matters involve common issues of fact and law, we consolidated the cases pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Analysis

I. Melanie's Appeal

A. Adjudication of Abuse as to Michael

[1] In her first argument on appeal, Melanie contends that the trial court erred in adjudicating Michael an abused juvenile. We disagree.

When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings. *In re A.R.*, 227 N.C. App. 518, 519-20, 742 S.E.2d 629, 631 (2013). Its conclusions of law, however, are reviewed *de novo*. *In re H.H.*, ___ N.C. App. ___, ___, 767 S.E.2d 347, 349 (2014).

The Juvenile Code defines an abused juvenile as one whose parent, guardian, custodian, or caretaker "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; . . . [u]ses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; . . . [or c]reates or allows to be created serious emotional damage to the juvenile." N.C. Gen. Stat. § 7B-101(1) (2013).

Here, the trial court made the following pertinent findings of fact in support of its conclusion that Michael was an abused juvenile:

> 13. That since 2012, [Melanie's] personality has changed and she has referred to [Robert] as a "prophet" and a "healer" and stated [Robert] could cast demons out of people and that the Federal Bureau of Investigation and the Central Intelligence Agency were looking for them.
>
> 14. That [Melanie] has informed co-workers of her belief that [Michael] is possessed with demons and that when she looked at him on occasion his face would "change" and that it would no longer look like her son.
>
> 15. That [Melanie] noticed [Michael] doing a "dance" and she researched the dance on the Internet herself and determined that it was a demonic dance.

16. That [Melanie] has made statements that she would give [Michael] up to God.

17. That [Melanie] has shown additional signs of confusion and paranoia and told her mother that her mother's property had been taken from someone else and also reported to her mother than [Melanie's] feet were "sticking to the floor," resulting in [Melanie] fleeing the home.

18. That while residing at the home of [Robert] with [Melanie] . . . [Michael] was forced to sleep at least two nights outside and this occurred in the month of February, 2014, during a very cold period of time.

. . . .

20. That [Robert] ordered [Michael] to go walk in the woods and pray and gave the instructions while holding a firearm, causing [Michael] distress.

21. That [Robert] and [Melanie] have, on numerous occasions, accused [Michael] of having demons inside of him and also told him demons were swirling around over his head.

22. That based upon the accusations and repeated statements of [Robert] and [Melanie,] [Michael] began to believe he had a demon inside of him.

23. That [Michael] likes to dance and on at least one occasion he was dancing and [Robert] and [Melanie] accused him of doing a demonic dance.

24. That [Michael] has been blindfolded and instructed to baptize himself by going under water in a bathtub seven times and while under saying "save me" seven times.

25. That [Michael] was also forced to sit on a stool and put his foot on a rock.

26. That [Melanie] has struck [Michael] with a belt repeatedly and [Michael] attempted to dodge the belt but [Melanie] would keep attempting to strike him resulting in [Michael] being hit all over his body, including his head.

27. That [Melanie] and [Robert] have tied [Michael] to a tree using duct tape.

Because Melanie has not challenged findings 13, 18, 20, 24, 25 or 26, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). Melanie does, however, challenge the trial court's findings of fact 14, 15, 16, 17, 21, 22, 23, and 27 as not supported by evidence, and we proceed to address each in turn.

With regard to finding of fact 14, Melanie "excepts to this finding to the extent that it implies that there were multiple conversations over a period of time during which the mother was convincing Michael and others that Michael was possessed." We do not read finding 14 as suggesting that Melanie continually and repeatedly engaged in conversations with her colleagues about her belief that her son was "possessed." Rather, we read the finding as signifying precisely what it states — that Melanie informed several co-workers that her son was possessed by demons. This finding is supported by competent evidence as two of Melanie's coworkers testified that Melanie had told each of them that Michael "has demons," his facial features would change at times, and that he suffered from "demonic possession."

In findings 15 and 23, the trial court described an incident where Melanie concluded that her son's dancing was a "demonic dance." In her brief, she asserts that the testimony at trial showed that Michael's dance "did not seem to be an issue" with her. However, the evidence of record shows that Melanie — while visibly upset — told one of her coworkers that her son had performed "a dance move, and it was Googled on the Internet and it was some type of demonic move." Michael likewise testified that he had been accused of performing a demonic dance when he had showed Melanie and Robert a "pop robotic" dance move to dubstep music. Thus, the trial court's findings that Melanie had determined that Michael's dance move was a demonic dance based on her Internet search and that Robert and Melanie had accused Michael of performing a demonic dance are supported by the evidence.

Melanie next argues that findings 16 and 17 — which refer to instances described by her mother Beth where Melanie displayed unusual behavior — are not indicative of Melanie suffering from paranoia or confusion and instead merely indicate the contentious relationship between the two women. However, Beth's testimony regarding her daughter's behavior supports the trial court's findings concerning these incidents, and it was the trial court's duty to determine what inferences should be drawn from that testimony. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (explaining that trial judge has responsibility to "weigh

and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom"). Moreover, two other witnesses, one being a licensed psychologist, described Melanie as paranoid.

Findings 21, 22, and 27 describe both Robert and Melanie accusing Michael of being possessed by demons and tying him to a tree. Melanie argues that these findings are inaccurate because "[Robert] did all of these things, not [her]." An examination of the record, however, reveals that Melanie told her son and other people that he was possessed by demons and that Michael had started to believe he was, in fact, "possessed" based on Robert's and Melanie's statements and actions towards him, which included their act of tying him to a tree with duct tape. Thus, these findings are also supported by the evidence and are binding on appeal. *See A.R.*, 227 N.C. App. at 519-20, 742 S.E.2d at 631.

As we have determined that each of the challenged findings was supported by competent evidence, we now turn to whether these findings supported the trial court's conclusion that Michael was an abused juvenile. As discussed above, a child is an abused juvenile if his parent, guardian, custodian, or caretaker "[u]ses or allows to be used upon [him] cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C. Gen. Stat. § 7B-101(1)(c).

Recently, in *H.H.*, our Court observed that a "review of the case law reveal[ed] only three cases, all unpublished and thus lacking precedential value, in which this Court has considered what actions constitute 'cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior.' " *H.H.*, ___ N.C. App. at ___, 767 S.E.2d at 350. We noted that two of these three cases involved extreme examples of discipline. In the first case, a child was choked, threatened with eating dog feces, and had a firearm pointed at him. *Id.* at ___, 767 S.E.2d at 350. In the second case, the juvenile was forced to stand in a "T-Shape" for up to five minutes with duct tape over his mouth while being struck with "a belt, paddle, switch, or other object." *Id.* at ___, 767 S.E.2d at 350. The third case involved allegations of abuse stemming from an incident where the child had been hit in the face and then kicked in the stomach by her mother. *Id.* at ___, 767 S.E.2d at 350. We concluded that the circumstances existing in *H.H.* — where the trial court found that the child had been struck "five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon" — were sufficient to warrant a finding of abuse. *Id.* at ___, 767 S.E.2d at 350.

Here, the trial court's findings establish that Michael was (1) forced to sleep outside on at least two cold nights during the month of February; (2) bound to a tree; (3) required to participate in a "self-baptism" in a bathtub full of water; (4) ordered by Robert to pray while Robert was brandishing a firearm; (5) struck with a belt "all over his body"; and (6) repeatedly told by Robert and Melanie that he was possessed by demons to the point that he himself began to believe it to be true. We hold that the trial court's findings concerning these incidents — all of which are supported by evidence of record — demonstrate that Michael was an abused juvenile in that he was subjected to cruel or grossly inappropriate procedures or devices to modify behavior.

Melanie argues that the factual findings made by the trial court were taken out of context in that the court described the incidents "as if Michael had not [previously] exhibited behavioral and mental health issues which prompted some of the actions." We reject this contention. First, Melanie cites no legal authority in support of her argument on this point. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Second, we are unpersuaded by the implication of her argument, which is that Michael's preexisting behavioral problems rendered the "discipline" inflicted upon him appropriate. The definition of abuse in this subsection of the statute focuses on the severity and brutality of the procedures and devices employed by the parent or caretaker against the juvenile rather than the juvenile's behavior that those procedures and devices were designed to correct. *See* N.C. Gen. Stat. § 7B-101(1)(c).

Thus, the trial court did not err in concluding that Michael was subjected to cruel or grossly inappropriate procedures or devices such that he was an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1). Because this ground standing alone is sufficient to support the adjudication of abuse, we need not address the trial court's two other grounds for adjudicating Michael an abused juvenile.

B. Placement on the Responsible Individuals List

[2] A "responsible individual" is statutorily defined as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a). The Department of Health and Human Services maintains a registry of responsible individuals and "may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the

fitness of individuals to care for and adopt children." N.C. Gen. Stat. § 7B-311(b) (2013). An individual may be placed on this list — known as the Responsible Individuals List ("RIL") — if (1) the individual is given notice pursuant to N.C. Gen. Stat. § 7B-320 that he or she has been identified as a responsible individual by a director of a county department of social services in conjunction with an investigative assessment of abuse or serious neglect; and (2) "[t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review." *Id.* At such a hearing, "the director shall have the burden of proving by a preponderance of the evidence the abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual." N.C. Gen. Stat. § 7B-323(b) (2013).

Melanie contends that the trial court's placement of her name on the RIL constituted error because (1) the hearing in the trial court failed to safeguard her right to due process of law; and (2) the evidence did not support a conclusion that she abused or seriously neglected Michael. Melanie asserts that because the RIL hearing was "conflated with the adjudication," she was deprived of her right to present sworn evidence, represent herself or obtain the services of an attorney at her own expense, and cross-examine witnesses and make a closing argument as provided for in N.C. Gen. Stat. § 7B-323(c). We disagree.

The issue of whether Michael was an abused and neglected juvenile and the issue of whether Melanie was a responsible individual were heard together. Melanie's attorney represented her on both matters by presenting evidence, cross-examining witnesses, and making arguments to the court. Indeed, the transcript reveals that during closing arguments Melanie's counsel expressly argued that Melanie's placement on the RIL would be improper. Moreover, Melanie never asserted during the proceedings that she wished to represent herself on the RIL issue. Thus, we conclude that Melanie was not deprived of the rights guaranteed by N.C. Gen. Stat. § 7B-323(c).

We are also satisfied that the trial court's conclusion that Melanie should be placed on the RIL is supported by its findings, which, in turn, are supported by competent evidence. As discussed in detail above, the evidence at trial demonstrated that Melanie "used or allowed to be used upon [Michael] cruel or grossly inappropriate devices or procedures to modify behavior" such that Michael was an abused juvenile. Thus, Melanie is a parent "who abuse[d] . . . a juvenile," and the trial court therefore did not err in ordering that her name be placed on the RIL. N.C. Gen. Stat. § 7B-101(18a) (defining responsible individual as

"[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile").

II. Robert's Appeal

[3] On 20 March 2015, Robert gave notice of appeal from the trial court's 11 February 2015 orders adjudicating Faye to be a neglected juvenile and ordering that she remain in the legal custody of DSS. However, this notice of appeal was untimely. On 15 June 2015, Robert filed a petition for writ of certiorari with this Court seeking our review of the merits of his appeal despite the fact that the notice of appeal was filed beyond the applicable deadline. On 29 June 2015, Faye's guardian *ad litem* filed a motion to dismiss Robert's appeal based on his untimely notice of appeal.

It is well established that this Court may, in its discretion, issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). We agree that Robert's appeal must be dismissed as untimely, but, in our discretion, we grant his petition for writ of certiorari for the purpose of considering the merits of his arguments.

Robert's sole contention on appeal is that the trial court erred by adjudicating Faye a neglected juvenile. We disagree.

A neglected juvenile is defined in N.C. Gen. Stat. § 7B-101(15) as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. *In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (emphasis added).

Our Court has previously explained that this definition of neglect affords "the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). A child may be adjudicated a neglected juvenile if

the injurious environment or the parent's failure to provide proper care causes the juvenile some physical, mental, or emotional impairment or creates "a substantial risk of such impairment." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993).

Here, the trial court made the following pertinent findings of fact in support of its determination that Faye was neglected:

> 17. That while residing at the home of [Robert] and [Faye], [Michael] was forced to sleep at least two nights outside and this occurred in the month of February, 2014, during a very cold period of time.
>
> . . . .
>
> 19. That [Robert] ordered [Michael] to go walk in the woods and pray and gave the instructions while holding a firearm, causing [Michael] distress.
>
> 20. That [Robert] and [Melanie] have, on numerous occasions, accused [Michael] of having demons inside of him and also told him demons were swirling around over his head.
>
> 21. That based upon the accusations and repeated statements of [Robert] and [Melanie,] [Michael] began to believe he had a demon inside of him.
>
> 22. That [Michael] has been blindfolded and instructed to baptize himself by going under water in a bathtub seven times and while under saying "save me" seven times.
>
> 23. That [Robert] and [Melanie] have tied [Michael] to a tree using duct tape.
>
> 24. That [Faye] has been exposed to the abuse and neglect of [Michael] despite the fact [Faye] herself has not been physically harmed by [Robert] or [Melanie].

Based on these findings, the trial court concluded as a matter of law that Faye lived in an environment injurious to her welfare and was therefore a neglected juvenile.

Robert argues that the trial court's conclusion of neglect is unsupported because the abuse of *Michael* does not demonstrate that *Faye* was at risk of physical, mental, or emotional impairment. This argument is meritless.

First, the record contains ample evidence that Faye witnessed and was exposed to Michael's abuse and neglect. Michael testified that Faye was either physically present for or at least aware of: (1) Robert conducting an "exorcism" to rid Michael of his demons; (2) Michael being blindfolded and "baptized" in the bathtub; and (3) Robert making Michael "do facial expressions," which led to Robert concluding that Michael was possessed by demons and forcing him to sleep outside in the cold while wearing only pajama pants, flip-flops, and a sleeveless t-shirt.

Admittedly, the trial court failed to make an express finding that Faye was at risk of impairment based on her exposure to Michael's abuse. However, in cases "[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). Moreover, this Court has held that the exposure of a child to the "infliction of injury by a parent to another child or parent, can be conduct causing or potentially causing injury" to that child. *In re W.V.*, 204 N.C. App. 290, 294, 693 S.E.2d 383, 386 (2010).

In the present case, Kristy Matala, a licensed psychologist who had conducted the child family evaluations for both Faye and Michael, testified that Faye's exposure to Michael's neglect and abuse "would be distressing for her" and "could cause her fear and worry about something like that happening to her." She further expressed her opinion that exposing a child to the "paranoid ideation" displayed by Robert and Melanie would cause that child "to feel unnecessary fear" and categorized such behavior as "emotional abuse."

Because of the clear evidence demonstrating that Faye lived in an injurious environment and faced a substantial risk of physical, mental, or emotional impairment, the trial court's adjudication of Faye as a neglected juvenile did not constitute error. Accordingly, we affirm the trial court's adjudication and disposition orders concerning Faye.

Conclusions

For the reasons stated above, we affirm the trial court's orders in file numbers 14 JA 24 and 14 JA 25.

AFFIRMED.

Judges CALABRIA and STROUD concur.

IN RE J. H.

[244 N.C. App. 255 (2015)]

IN THE MATTER OF J.H.

No. COA15-579

Filed 1 December 2015

1. Appeal and Error—child custody—jurisdiction—properly before appellate court

Respondent-mother's jurisdictional claim under the Uniform Child-Custody Jurisdiction and Enforcement Act was properly before the Court of Appeals. The trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal.

2. Child Custody and Support—jurisdiction—movement between Texas and North Carolina

A case under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) that involved a child who was moved back and forth between Texas and North Carolina was remanded for a determination of whether a Texas court exercised jurisdiction in substantial conformity with the UCCJEA. The Texas court issued the initial determination; the North Carolina trial court exercised temporary emergency jurisdiction for nonsecure custody, for which it had jurisdiction; the North Carolina court also entered an adjudication and disposition order, for which it did not have jurisdiction; and a Texas order which may have also exercised temporary emergency jurisdiction was not in the record.

3. Appeal and Error—child custody—reports—no objection at trial—review waived

A guardianship with grandparents in a child custody dispute was remanded where the trial court relied on written reports that were not formally tendered and admitted. Appellate review was waived because respondent-mother did not object to the trial court's consideration of these reports.

4. Child Custody and Support—guardianship—grandparents' understanding of legal significance

In a child custody and guardianship proceeding remanded on other grounds, the trial court failed to verify that the grandparents understood the legal significance of guardianship, because the grandparents did not testify at the permanency planning hearing and neither DSS nor the guardian ad litem reported to the court that the grandparents were aware of the legal significance of guardianship.

5. Child Custody and Support—mother's unresolved issues—custody not returned within six months

Findings in a matter remanded on other grounds that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse, and needed to continue progress in those areas adequately supported the trial court's conclusion of law that returning the child to respondent-mother's care within six months would be contrary to his best interests. Furthermore, the evidence supported the conclusion that further efforts to reunify James with respondent-mother would be futile,

6. Child Visitation—minimal visitation with mother—child's best interest

The trial court's findings supported its conclusion that it was in the child's best interest to have minimal visitation with respondent-mother where the mother had not resolved her issues.

7. Child Custody and Support—visitation—duration not established

In a child custody and guardianship case remanded on other grounds, a visitation order failed to establish the duration of the respondent-mother's monthly visitation.

8. Child Custody and Support—findings—remand

In a child custody and guardianship case remanded on other grounds, the trial court did not making findings concerning waiving subsequent permanency planning hearings in support of certain criteria in N.C.G.S. § 7B-906.1(n) and should do so if the court reconsiders the issue.

Appeal by respondent-mother from order entered on 23 February 2015 by Judge M. Patricia DeVine in District Court, Chatham County. Heard in the Court of Appeals on 28 October 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Chatham County Department of Social Services and Poyner Spruill LLP, by J.M. Durnovich, for guardian ad litem.

Sydney Batch, for respondent-appellant.

STROUD, Judge.

IN RE J. H.

[244 N.C. App. 255 (2015)]

Respondent-mother appeals from a permanency planning order which established a permanent plan for guardianship for her son J.H. ("James")[1] and appointed his maternal grandparents as guardians. Respondent-mother argues that the trial court (1) lacked jurisdiction to enter orders affecting James's custody under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"); (2) erred in relying on written reports that had not been formally tendered and admitted into evidence; (3) failed to verify that James's grandparents understood the legal significance of guardianship and had adequate resources to care for James; (4) erred in concluding that it was impossible to return James to respondent-mother within six months and that further reunification efforts would be futile; (5) erred in concluding that it was in James's best interests for respondent-mother to have minimal visitation and entering a visitation plan that failed to set out the duration of each visitation; and (6) erred in waiving further review hearings. We vacate and remand for further proceedings. We also deny the motion to dismiss by the guardian *ad litem* ("GAL").

I. Background

In April 2013, James was born in North Carolina. From April 2013 to late November 2013, James and respondent-mother lived in North Carolina. Respondent-father resides in North Carolina. On 22 November 2013, respondent-mother took James with her to Texas. On 13 January 2014, after a physical altercation in Texas with her ex-husband ("Mr. J."), respondent-mother left James with Mr. J. without baby supplies. On or about 29 January 2014, a Texas court ordered that respondent-mother have temporary sole custody of James and that respondent-father have no contact with James because he had not yet established paternity.

On or about 20 February 2014, respondent-mother and James returned to North Carolina. On 7 March 2014, Chatham County Department of Social Services ("DSS") filed a juvenile petition alleging that James was neglected and dependent. DSS alleged that respondent-father had been recently charged with assaulting respondent-mother and that he "was about to hit [James but] Respondent mother [had] intervened." DSS also alleged that respondent-mother had a "long history" of untreated substance abuse as well as a history with Child Protective Services ("CPS") in Alamance County and in Texas. DSS further alleged that respondent-mother "ha[d] moved around in order to avoid CPS involvement" and had said that "she plan[ned] to leave this jurisdiction

1. We use this pseudonym to protect the juvenile's identity.

and return to Texas." On 7 March 2014, the trial court granted DSS nonsecure custody of James, and DSS placed James with his maternal grandparents, who are custodians of respondent-mother's daughter, who was born in July 2008.

On 22 May 2014, the trial court held a hearing on the petition. On 19 June 2014, the trial court adjudicated James a neglected and dependent juvenile. The trial court found that respondents had a history of domestic violence and noted that on 3 August 2013, Alamance County Department of Social Services had received a report of physical abuse, domestic violence, and improper care of James, which was later substantiated. The trial court further found that respondent-mother "has a fifteen (15) year ongoing history of substance abuse" and "has participated in treatment through [F]reedom House and other treatment facilities." The trial court also found that when a social worker had met with respondent-mother, the social worker had observed the following: "[Respondent-mother had] bruises on her face, arm, back and stomach. She was erratic in her behavior, repeated herself several times and was unable to sit still. She described a history of violence between [her] and Respondent father." The trial court also found that James had been "born positive for barbitu[r]ates" and "was noted to have developmental delays" at the time DSS took him into nonsecure custody on 7 March 2014. Specifically, James "was not able to roll over, crawl, scoot or pull himself up, as is typical for his age."

After holding a custody review hearing on 24 July 2014, the trial court entered a custody review order on 2 September 2014 continuing James's custody with DSS and his kinship placement with his maternal grandparents and denying respondent-mother any visitation with James. After holding a hearing on 8 January 2015, the trial court entered a permanency planning order on 23 February 2015 concluding that further reunification efforts would be futile, establishing a permanent plan of guardianship for James, and appointing his maternal grandparents as his guardians. The trial court awarded respondent-mother "monthly" supervised visitation with James but waived further review hearings and relieved DSS and the GAL "of further responsibility" in the case. The trial court also found: "Since the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas." Respondent-mother gave timely notice of appeal from the 23 February 2015 permanency planning order.

II. UCCJEA Jurisdiction

A. Preservation

[1] Respondent-mother contends that the trial court lacked subject matter jurisdiction under the UCCJEA. *See* N.C. Gen. Stat. ch. 50A, art. 2 (2013). Having failed to appeal from the 7 March 2014 order for nonsecure custody, the 19 June 2014 adjudication and disposition order, and the 2 September 2014 custody review order, respondent-mother now argues that the issue of subject matter jurisdiction may be raised at any time and that lack of such jurisdiction makes void all of the trial court's orders although she "concedes that it is arguable the trial court had the authority to exercise emergency jurisdiction and grant nonsecure custody of James to DSS[.]" The GAL responds that respondent-mother's failure to appeal from the 19 June 2014 adjudication and disposition order bars her from now challenging the trial court's jurisdiction.

"It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case." *In re S.D.A.*, *R.G.A.*, *V.P.M.*, *& J.L.M.*, 170 N.C. App. 354, 355, 612 S.E.2d 362, 363 (2005). "Subject matter jurisdiction cannot be conferred by consent or waiver" by the parties. *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged *at any stage of the proceedings*, even for the first time on appeal." *In re K.U.-S.G.*, *D.L.L.G.*, *& P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (emphasis added and citation and quotation marks omitted). "When the trial court never obtains subject matter jurisdiction over the case, all of its orders are void *ab initio*." *In re A.G.M.*, ___ N.C. App. ___, ___, 773 S.E.2d 123, 129 (2015) (quotation marks and brackets omitted). We therefore conclude that respondent-mother's jurisdictional claim is properly before this Court.

B. Standard of Review

> The North Carolina Juvenile Code grants our district courts "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2011). However, the jurisdictional requirements of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") and the Parental Kidnapping Prevention Act ("PKPA") must also

> be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.

In re E.J., 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013). Whether the trial court has jurisdiction under the UCCJEA is a question of law subject to *de novo* review. *See K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. at 131, 702 S.E.2d at 105.

C. Analysis

[2] We preliminarily note that the juvenile petition, as included in the record on appeal, lacked the information required by N.C. Gen. Stat. §§ 7B-402(b), 50A-209(a) regarding "the places where the child has lived during the last five years" and DSS's knowledge "of any proceeding that could affect the current proceeding[.]" See N.C. Gen. Stat. §§ 7B-402(b), 50A-209(a) (2013). Typically, DSS satisfies this statutory obligation by filing an "Affidavit as to Status of Minor Child" form, listing the addresses of the juvenile and his caretakers "during the past five (5) years" and providing "information about a[ny] custody proceeding . . . that is pending in a court of this or another state and could affect this proceeding." Form AOC-CV-609 (revised July 2011) (Portion of original in all caps). Here, DSS even alleged: "The information required by G.S. 50A-209 is set out in the Affidavit As To Status Of Minor Child (AOC-CV-609), which is attached hereto and incorporated herein by reference." (Portion of original in bold.) But no such affidavit appears in the record, even though the petition listed respondent-mother's address as a motel in Siler City, North Carolina and included allegations that "Respondent mother has a CPS history in Alamance County and in the state of Texas[,]" that "Child Protective Services in Texas reports that Respondent mother did not comply with service recommendations for . . . supervised visitation[,]" and that "Respondent mother has said that she plans to leave this jurisdiction and return to Texas."[2] "It was the continuing duty of DSS to make reasonable efforts to insure that there were no proceedings in another state that could affect the current proceeding." *A.G.M.*, ___ N.C. App. at ___, 773 S.E.2d at 128 (quotation marks omitted) (citing N.C. Gen. Stat. § 50A-209(d) (2013)).

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2. We realize that it is not uncommon for documents attached as exhibits to pleadings to be inadvertently omitted when the documents are later being copied, and it is entirely possible that an affidavit was attached to the petition when it was filed. Unfortunately, the information which might have been on the affidavit is crucial to the issue raised in this appeal, but it is not in our record.

i. Texas Child-Custody Determination

At the initial adjudicatory and dispositional hearing on 22 May 2014, the trial court received into evidence and found credible reports submitted by DSS and the GAL. The trial court attached these reports to its 19 June 2014 adjudication and disposition order and incorporated them by reference into its findings of fact. The GAL's report stated:

> On January 13, 2014, [respondent-mother] was publicly intoxicated after a physical altercation with [Mr. J.] She left the home with [James] without baby supplies. [James] was released to [Mr. J.] A Safety Plan was put in place on February 3, 2014, requiring [Mr. J.] to supervise all contact between [James] and his mother.

DSS's "Adjudication Court Report" included the following information about a previous Texas order:

> While discussing possible placement options, [respondent-mother] produced a court order from the state of Texas dated 01/29/14 stating that [respondent-father] is to have no contact with the minor child, [James], and that [respondent-mother] has temporary sole custody. The order stated that "the court finds that [respondent-father] has not established paternity to the child and is not entitled to possession of or access to the child." Thus [respondent-father] was not considered as a placement option at the time of removal.

Based upon this description of the action by the Texas court, it appears that the 29 January 2014 Texas order constitutes an "initial determination" under the UCCJEA. *See* N.C. Gen. Stat. § 50A-102(8) (2013) (defining "initial determination" as "the first child-custody determination concerning a particular child").

DSS and the GAL argue that we must dismiss this appeal because respondent-mother failed to include this Texas order in the record on appeal. We agree that the order should have been included in the record on appeal, just as it should have been noted on the Affidavit as to Status of Minor Child which DSS should have attached to the petition as discussed above. For many issues on appeal, the failure to include this type of information in the record would result in waiver of an argument based upon the missing information, at the very least. But in this case, we are addressing a jurisdictional defect, and under both state and federal law, specifically the UCCJEA and the PKPA, the courts of this

state have an affirmative duty to recognize and enforce a valid child-custody determination made by a court of another state. N.C. Gen. Stat. § 50A-303(a) provides:

> A court of this State shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this Article or the determination was made under factual circumstances meeting the jurisdictional standards of this Article, and the determination has not been modified in accordance with this Article.

Id. § 50A-303(a) (2013). Similarly, 28 U.S.C.A. § 1738A(a) provides:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

28 U.S.C.A. § 1738A(a) (2006). "When a prior custody order exists, a court cannot ignore the provisions of the UCCJEA and the Parental Kidnapping Prevention Act." *H.L.A.D.*, 184 N.C. App. at 385, 646 S.E.2d at 429 (brackets omitted).

In addition, our Court has long recognized the duty of the trial court to make an inquiry regarding jurisdiction: "Whenever one of our district courts holds a custody proceeding in which one contestant or the children appear to reside in another state, the court must initially determine whether it has jurisdiction over the action." *Davis v. Davis*, 53 N.C. App. 531, 535, 281 S.E.2d 411, 413 (1981) (footnotes omitted). And despite the lack of complete information in our record, based upon the orders and reports of record, we know that there was an initial determination of custody by Texas, that the respondent-mother provided this order to DSS, and that the trial court was aware of the Texas order. Accordingly, we must examine whether the trial court properly exercised subject matter jurisdiction under the UCCJEA.

ii. Modification Jurisdiction under N.C. Gen. Stat. § 50A-203

Since the Texas court's entry of an initial child-custody determination as to James, "any change to that [Texas] order qualifies as a modification under the UCCJEA." *See In re N.R.M., T.F.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004); N.C. Gen. Stat. § 50A-102(11). The

trial court did not make any findings of fact specifically addressing its subject matter jurisdiction under the UCCJEA. The UCCJEA does not specifically require these findings, although it would be a better practice to make them. *See In re E.X.J. & A.J.J.*, 191 N.C. App. 34, 40, 662 S.E.2d 24, 27-28 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009). Accordingly, we must examine if "certain circumstances" exist to support subject matter jurisdiction under the UCCJEA, even if there are no specific findings to that effect. *See id.*, 662 S.E.2d at 27-28.

The jurisdictional requirements for a modification under the UCCJEA are as follows:

> *Except as otherwise provided in G.S. 50A-204*, a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:
>
> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (2013) (emphasis added). Section 50A-203 thus allows a North Carolina court to modify another state's initial child-custody determination only when

> two requirements are satisfied: (1) the North Carolina court has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2); and (2) (a) a court of the issuing state determines either that it no longer has exclusive, continuing jurisdiction under UCCJEA § 202 or that the North Carolina court would be a more convenient forum under UCCJEA § 207; or (b) a North Carolina court or a court of the issuing state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the issuing state.

K.U.-S.G., *D.L.L.G.*, *& P.T.D.G.*, 208 N.C. App. at 133, 702 S.E.2d at 106 (quotation marks and brackets omitted).

a. Initial Jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1)

A North Carolina court has jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) if North Carolina was

> the home state of the child on the date of the commencement of the proceeding, or *was the home state of the child within six months before the commencement of the proceeding*, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]

N.C. Gen. Stat. § 50A-201(a)(1) (2013) (emphasis added). A child's "home state" is

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7). N.C. Gen. Stat. § 50A-102(5) defines "commencement" for UCCJEA purposes as "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5).

We review the history of James and his parents' residences in this case. In April 2013, James was born in North Carolina. The record suggests and no party disputes that from April 2013 to late November 2013, James and respondent-mother lived in North Carolina. On 22 November 2013, respondent-mother took James with her to Texas. On or about 20 February 2014, respondent-mother and James returned to North Carolina. On 7 March 2014, DSS filed the juvenile petition and obtained nonsecure custody of James and placed him with his maternal grandparents, who live in North Carolina. Respondent-father, who was confirmed to be James's father in April 2014, resides in North Carolina. In its 23 February 2015 permanency planning order, the trial court found that "[s]ince the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina."

Before 22 November 2013, North Carolina was James's home state. *See id.* § 50A-102(7). This date falls "within six months before the commencement of the proceeding" on 7 March 2014. *See id.* § 50A-201(a)(1).

At all relevant times, respondent-father has lived in North Carolina. Accordingly, the trial court had jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1). *See id.*

b. Jurisdictional Requirement of N.C. Gen. Stat. § 50A-203(2)

The second jurisdictional requirement for modification of an initial child-custody determination under the UCCJEA is the following:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Id. § 50A-203. The determination under subsection (1) above is one that the Texas court would have to make. "[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction." *N.R.M.*, *T.F.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 official comment (2003)). Nothing in the record suggests that a Texas court determined that "it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of [North Carolina] would be a more convenient forum under G.S. 50A-207[,]" so we must address whether subsection (2) is satisfied. *See* N.C. Gen. Stat. § 50A-203.

In its 23 February 2015 permanency planning order, the trial court found: "*Since the inception of this case*, *Respondent mother has resided in Texas* but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas." (Emphasis added.) Respondent-mother testified at the permanency planning hearing on 8 January 2015 that she had been living in Converse, Texas with her ex-husband "[f]or a little over a year." Because the trial court found that respondent-mother resided in Texas, we hold that subsection (2) was not satisfied and thus the trial court lacked modification jurisdiction under N.C. Gen. Stat. § 50A-203. But this conclusion does not end our inquiry since N.C. Gen. Stat. § 50A-203 begins with the phrase: "Except as otherwise provided in G.S. 50A-204[.]" *Id.*

iii. Temporary Emergency Jurisdiction under N.C. Gen. Stat. § 50A-204

A court may exercise temporary emergency jurisdiction "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." *Id.* § 50A-204(a) (2013). In the juvenile petition, DSS alleged that respondent-father had been recently charged with assaulting respondent-mother and that he "was about to hit [James but] Respondent mother [had] intervened." In the 7 March 2014 order for nonsecure custody, the trial court checked a box to find that: "[T]he juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection." In *In re E.X.J. & A.J.J.* and *In re N.T.U.*, this Court held that a trial court had temporary emergency jurisdiction to grant nonsecure custody to DSS under similar factual circumstances. *E.X.J. & A.J.J.*, 191 N.C. App. at 40, 662 S.E.2d at 27; *In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 54, *disc. review denied*, ___ N.C. ___, 763 S.E.2d 517 (2014). We hold that the trial court had temporary emergency jurisdiction to enter the 7 March 2014 order for nonsecure custody. *See E.X.J. & A.J.J.*, 191 N.C. App. at 40, 662 S.E.2d at 27; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 54; N.C. Gen. Stat. § 50A-204(a).

But as best we can tell from the record before us, in the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015 permanency planning order, the trial court did not exercise temporary emergency jurisdiction in accordance with N.C. Gen. Stat. § 50A-204, because in none of those orders did it "specify . . . a period that the court considers adequate to allow [DSS] to obtain an order" from the Texas court. *See* N.C. Gen. Stat. § 50A-204(c). Nor did the trial court "immediately communicate" with the Texas court. *See id.* § 50A-204(d); *In re J.W.S.*, 194 N.C. App. 439, 451-53, 669 S.E.2d 850, 857-58 (2008) (holding that "while the trial court had temporary jurisdiction to enter the nonsecure custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication order[,]" because "the record [was] devoid of evidence that the trial court ever communicated with the New York court to determine if the New York court wished to exercise jurisdiction[.]"). We also note that the trial court did not purport to exercise temporary emergency jurisdiction; rather, in all three orders, it merely

stated the bare conclusion: "[The] Court has jurisdiction, both personal and subject matter, and all parties have been properly served and are properly before the Court."

We recognize that in *E.X.J. & A.J.J.* and *N.T.U.*, this Court held that the trial court had subject matter jurisdiction to enter subsequent orders despite the fact that it initially only had temporary emergency jurisdiction, because North Carolina eventually acquired home state status. *E.X.J. & A.J.J.*, 191 N.C. App. at 44, 662 S.E.2d at 29-30; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 55. But we distinguish those cases, because in those cases, a court of another state never entered a child-custody order. *See E.X.J. & A.J.J.*, 191 N.C. App. at 43-44, 662 S.E.2d at 29-30; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 55. In summary, we hold that the trial court properly exercised temporary emergency jurisdiction in the 7 March 2014 order for nonsecure custody but did not have temporary emergency jurisdiction to enter the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, or the 23 February 2015 permanency planning order.

iv. Texas Court's Jurisdiction

The Texas court also may have exercised temporary emergency jurisdiction. Unfortunately, the record does not include the Texas order, so we must vacate the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015 permanency planning order and remand this case to the trial court to examine the Texas order, communicate with the Texas court if necessary, and determine whether the Texas court was (1) exercising exclusive, continuing jurisdiction; (2) exercising temporary emergency jurisdiction; or (3) not exercising jurisdiction in substantial conformity with the UCCJEA. We note that in *Davis*, this Court addressed on its own the issue of whether a California court was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act ("UCCJA"), the UCCJEA's predecessor, but we distinguish that case because the issue of temporary emergency jurisdiction was not at issue there. *See Davis*, 53 N.C. App. at 542, 281 S.E.2d at 417. In addition, as best we can tell from the opinion, the California order was available for this Court's review in *Davis*. Here, we do not have the Texas order before us and thus cannot determine on appeal whether the Texas court exercised jurisdiction in substantial conformity with the UCCJEA.

If the Texas court exercised exclusive, continuing jurisdiction, we direct the trial court to communicate with the Texas court under N.C. Gen. Stat. § 50A-110 (2013) to request the Texas court to determine

(1) whether it no longer has exclusive, continuing jurisdiction; and (2) whether a North Carolina court would be a more convenient forum. *See id.* § 50A-203(1). If the Texas court exercised temporary emergency jurisdiction, we direct the trial court to immediately communicate with the Texas court under N.C. Gen. Stat. § 50A-110 to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." *See id.* § 50A-204(d). If the trial court should determine that the Texas court was not exercising jurisdiction "in substantial conformity" with the UCCJEA, the trial court has no duty to recognize or enforce the Texas order and may exercise initial child-custody jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1). *See id.* § 50A-303(a).

Although we must remand the case for a proper determination of the trial court's jurisdiction under the UCCJEA, "we proceed to address [respondent-mother's] remaining arguments on appeal in the interests of expediting review." *In re E.G.M.*, ___ N.C. App. ___, ___, 750 S.E.2d 857, 863 (2013) (quotation marks omitted). "In the event that the trial court concludes on remand that it lacks subject matter jurisdiction, then it will be required to dismiss the petition." *Id.* at ___, 750 S.E.2d at 863 (brackets and ellipsis omitted).

III. Permanency Planning Order

[3] Respondent-mother next argues that the trial court (1) erred in relying on written reports that had not been formally tendered and admitted into evidence; (2) failed to verify that James's grandparents understood the legal significance of guardianship and had adequate resources to care for James; (3) erred in concluding that it was impossible to return James to respondent-mother within six months and that further reunification efforts would be futile; (4) erred in concluding that it was in James's best interests for respondent-mother to have minimal visitation and entering a visitation plan that failed to set out the duration of each visitation; and (5) erred in waiving further review hearings.

A. Standard of Review

Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.V. & M.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009) (brackets omitted). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re L.T.R. & J.M.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122,

125 (2007). In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. *See In re T.K., D.K., T.K. & J.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741 (construing predecessor statute N.C. Gen. Stat. § 7B-907 (2003)), *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re P.A.*, ___ N.C. App. ___, ___, 772 S.E.2d 240, 245 (2015).

B. Consideration of Evidence

Respondent-mother contends that the trial court erred in relying on the following written reports, because they were not formally tendered and admitted into evidence during the hearing: (1) the 8 January 2015 DSS report; (2) the 8 January 2015 GAL report; and (3) the 15 December 2014 psychological evaluation report of respondent-mother prepared by Dr. Karin Yoch. Without these reports, respondent-mother contends, most of the findings of fact and five of the conclusions of law in the permanency planning order lack any evidentiary support.[3]

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). As noted by DSS and the GAL, respondent-mother offered no objection at the 8 January 2015 hearing to the trial court's consideration of these reports. Accordingly, we conclude that she waived appellate review of this issue under North Carolina Rule of Appellate Procedure 10(a)(1).

We are not persuaded by respondent-mother's suggestion that she had no opportunity to object at the permanency planning hearing, absent a formal tender of the reports into evidence by DSS and the GAL. The hearing transcript reflects that counsel for DSS announced at the beginning of the hearing, "Judge, we have a court report in [this] matter. . . . So I'm handing to you . . . a permanency planning hearing court report and [Dr. Yoch's] psychological evaluation on the mother." The trial court thanked counsel for the documents. After welcoming the GAL, the trial court announced as follows: "Well, here's what I'm going to do. I'm

3. Respondent-mother makes a blanket challenge to Findings of Fact 3(c), 3(g), 3(h), 5-11, and 13-19 and to all five conclusions of law.

going to read everything, and then, [counsel for respondent-mother], if you'd like me to hear from your client, she can stand right there and say whatever she would like to." At no time during this exchange, or during the ensuing pause in proceedings while the court reviewed the written reports, did counsel for respondent-mother object to the court's consideration of these reports. At one point, her counsel even asked "to say something about the psychological evaluation" and offered an explanation for the report's statement "that [James] was born positive for barbiturates and [respondent-mother tested] positive for benzodiazepine" at the time of James's birth. As the transcript makes clear, the trial court both received and intended to consider these reports as evidence. Under Rule 10(a)(1), respondent-mother's failure to raise a timely objection at the hearing is a bar to her current argument on appeal. *See* N.C.R. App. P. 10(a)(1).

Further, we find no merit to respondent-mother's objection. As a type of dispositional hearing, a permanency planning hearing "may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile." N.C. Gen. Stat. § 7B-901 (2013); *see also* 2015-2 N.C. Adv. Legis. Serv. 236, 241-42, 250 (LexisNexis) (reflecting sections 9 and 18 of chapter 136 of the 2015 N.C. Session Laws, which organized N.C. Gen. Stat. § 7B-901 into subsections and designated the quoted language to subsection (a) for all "actions filed or pending on or after" 1 October 2015); N.C. Gen. Stat. § 7B-906.1(c) (2013). These hearings are not governed by the North Carolina Rules of Evidence. *See In re M.J.G.*, 168 N.C. App. 638, 648, 608 S.E.2d 813, 819 (2005). We therefore conclude that the trial court was free to consider the written reports submitted by DSS, the GAL, and Dr. Yoch without a formal proffer and admission of these documents into evidence as exhibits. *See id.*, 608 S.E.2d at 819.

C. Verification of Guardians

[4] Respondent-mother next claims that the trial court awarded guardianship of James to his maternal grandparents without verifying that they "understand[] the legal significance" of guardianship and have "adequate resources to care appropriately for the juvenile[,]" as required by N.C. Gen. Stat. §§ 7B-600(c), -906.1(j) (2013). We have held that the trial court need not "make any specific findings in order to make the verification" under these statutory provisions. *In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (construing N.C. Gen. Stat. § 7B-600(c) and predecessor statute N.C. Gen. Stat. § 7B-907(f) (2005)), *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). But the record must contain competent evidence of the guardians' financial resources and their awareness

of their legal obligations. *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 246 (addressing the issue of verification of a guardian's resources); *In re L.M.*, ___ N.C. App. ___, ___, 767 S.E.2d 430, 433 (2014) (holding "there was insufficient evidence that [the child's] foster mother understood and accepted the responsibilities of guardianship"). As this Court recently explained:

> It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, nor does the law require any specific form of investigation of the potential guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). But the statute does require the trial court to make a determination that the guardian has "adequate resources" and some evidence of the guardian's "resources" is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence. . . .
>
> . . . .
>
> The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact "adequate."

P.A., ___ N.C. App. at ___, 772 S.E.2d at 246-48 (brackets omitted). In *P.A.*, a social worker testified that the potential guardian provided a residence for the child and was able to meet all of the child's medical, dental, and financial needs. *Id.* at ___, 772 S.E.2d at 247. This Court held that this conclusory testimony was insufficient to show that the potential guardian had adequate resources to care for the child. *Id.* at ___, 772 S.E.2d at 248.

At the time of the permanency planning hearing, James had been in a successful kinship placement with his maternal grandparents for ten months. The trial court found that the grandparents had met "[a]ll of his well-being needs[,]" and the 8 January 2015 DSS report stated that they had been "meeting [James's] medical needs as well, making sure that he has his yearly well-checkups." The GAL's 8 January 2015 report stated that James had "no current financial or material needs[.]" The grandparents also have custody of James's sister. But this evidence alone is insufficient to support a finding that James's grandparents "have adequate resources" to care for James. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j); *P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 247-48 (holding that a similar amount of evidence was insufficient to satisfy N.C. Gen. Stat.

§§ 7B-600(c), -906.1(j)). The trial court also failed to "make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate." *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 248 (quotation marks and brackets omitted).

Similarly, the trial court cannot make a determination that a potential guardian understands the legal significance of a guardianship unless the trial court receives evidence to that effect. *See L.M.*, ___ N.C. App. at ___, 767 S.E.2d at 433. Here, the trial court failed to verify that the grandparents understood the legal significance of guardianship, because the grandparents did not testify at the permanency planning hearing and neither DSS nor the GAL reported to the court that the grandparents were aware of the legal significance of guardianship. *See id.*, 767 S.E.2d at 433. Should the trial court reconsider this issue on remand, we direct it to comply with N.C. Gen. Stat. §§ 7B-600(c), -906.1(j).[4] *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 248.

We also note that the trial court on remand should more clearly address whether respondent-mother is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court again consider granting custody or guardianship to a nonparent. In *In re B.G.*, this Court addressed this issue:

> [T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.
>
> Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact.

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4. We recognize that the grandparents have custody of James's sister, so it is possible that the trial court was aware of the grandparents' resources and understanding of their responsibilities from its consideration of her case. "But we must base our analysis only on the evidence which appears in the record on appeal in this case." *P.A.*, ___ N.C. App. at ___ n.3, 772 S.E.2d at 248 n.3.

> Rather, our review is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Accordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

In re B.G., 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009) (citations and quotation marks omitted).

D. Reunification

[5] Respondent-mother argues that the trial court's findings of fact do not support its conclusion of law that it is not possible for James to be returned home within the next six months and its conclusion of law that further efforts to reunify James with respondent-mother would be futile and inconsistent with James's health, safety, and need for a safe, permanent home within a reasonable period of time.[5] *See* N.C. Gen. Stat. § 7B-906.1(d)(3), (e)(1) (2013).

i. Impossibility of Returning Home Within Six Months

N.C. Gen. Stat. § 7B-906.1(e)(1) provides:

> At any permanency planning hearing where the juvenile is not placed with a parent, the court shall . . . consider the following criteria and make written findings regarding those that are relevant:
>
> > (1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.

N.C. Gen. Stat. § 7B-906.1(e)(1). The trial court's findings must explain "why [James] could not be returned home immediately or within the next six months, and why it is not in [his] best interests to return home." *In re I.K.*, 227 N.C. App. 264, 275, 742 S.E.2d 588, 595-96 (2013).

The trial court made the following findings in support of its conclusion of law that it would not be possible to return James to respondent-mother's home within the next six months:

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5. The trial court mislabeled these conclusions of law as findings of fact. *See E.G.M.*, ___ N.C. App. at ___, 750 S.E.2d at 867 (holding that a trial court's finding that grounds exist to cease reunification efforts was a conclusion of law). But the mislabeling of a conclusion of law as a finding of fact has no impact on its efficacy. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007).

3. It is not possible for the juvenile to be returned home in the immediate future or within the next six (6) months and in support thereof, the court specifically finds:

a. Respondent mother has a history of addiction that dates to her teenage years. She has been in [multiple] treatment programs but has never sustained a significant period of recovery and sobriety.

b. Since the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas. They have had a violent relationship that she reports is no longer violent.

c. Respondent mother has likewise had a violent relationship with Respondent father. From [mid-June] 2014 until [mid-July] 2014, Respondent mother traveled to North Carolina from Texas and while in the state, stayed with Respondent father. During this time, there was serious violence between Respondent parents. Although Respondent mother first denied that she was staying with Respondent father, she ultimately called the Social Worker and asked the Social Worker to pick her up from Respondent father's home as she was afraid of him. The Social Worker removed her from the home and two days later, she returned to Texas.

d. Respondent mother signed a Services Agreement in May 2014. The agreement included that Respondent mother should obtain drug treatment and complete a psychological evaluation.

e. On or about September 29, 2014, Respondent mother entered a seventy (70) day inpatient program in San Antonio, Texas called Alpha House. As of this hearing, Respondent mother reports one hundred and three (103) days of clean time and she reports that she continues to be in an outpatient treatment program.

. . . .

> g. Respondent mother completed a psychological evaluation with Dr. Karin Yoch [in December 2014]. The report has been reviewed by the court in its[] entirety and is included in the file of this matter. The evaluation is incorporated herein as findings of fact as though fully set forth and supports the conclusions and orders herein set forth below. According to Dr. Yoch, Respondent mother needs multiple services, including *nine (9) months* of sustained clean time prior to giving consideration to a return of [James] to her care.
>
> . . . .
>
> 5. When [James] was placed with the maternal grandparents, he had been neglected, which Respondent mother now admits. When [James] was first placed with the maternal grandparents, he suffered from developmental delays, likely due to being neglected by Respondent mother. His speech is delayed and he often grunts and points as a form of communication. [James] has gained weight and is walking and running. All of his well-being needs are being met by the maternal grandparents.
>
> 6. [James] needs stability, structure, consistency and to be loved and nurtured. It would likely be harmful and detrimental to [James] to remove him from the home of his maternal grandparents.
>
> 7. Given Respondent mother's lengthy history of drug addiction and her very recent admission to inpatient and outpatient drug treatment, it is not in [James's] best interest to be returned to the custody and care of Respondent mother. Respondent mother has much work to do before she will be able to parent and she has only just begun to address her addiction and mental health issues.

(Emphasis added.) The trial court found that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse and needed to continue to make progress in those areas before reunification could occur. We conclude that these findings adequately support the trial court's conclusion of law under N.C. Gen. Stat. § 7B-906.1(e)(1) that returning James to respondent-mother's care within six months would be contrary to his best interests.

ii. Futility of Further Reunification Efforts

Respondent-mother also challenges the trial court's conclusion of law that "[b]ased upon the evidentiary findings listed above, further efforts to reunify or place [James] with Respondent mother clearly would be futile and/or inconsistent with [James's] health, safety, and need for a safe, permanent home within a reasonable period of time." Respondent-mother acknowledges her "very long substance [abuse] history" and "several" prior attempts at sobriety but "asserts that her current efforts at reunification and compliance with her case plan support continued reunification efforts."

Section 7B-906.1 of the Juvenile Code requires the trial court at each permanency planning hearing to "consider the following criteria and make written findings regarding those that are relevant: . . . [w]hether efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3). This determination "is in the nature of a conclusion of law that must be supported by adequate findings of fact." *E.G.M.*, ___ N.C. App. at ___, 750 S.E.2d at 867.

The trial court made the following findings, which show that at the time of the 8 January 2015 hearing, respondent-mother had begun to address her domestic violence, mental health, and substance abuse issues:

> [3]b. . . . [Respondent-mother] reports that she lives with her ex-husband in Texas. They have had a violent relationship that she reports is no longer violent.
>
> e. On or about September 29, 2014, Respondent mother entered a seventy (70) day inpatient program in San Antonio, Texas called Alpha House. As of this hearing, Respondent mother reports one hundred and three (103) days of clean time and she reports that she continues to be in an outpatient treatment program.
>
> f. Respondent mother reports that she works at a restaurant approximately thirty (30) hours per week.

In addition, Dr. Yoch's psychological evaluation report, which the trial court incorporated into its findings of fact, included the following recommendation:

> Reunification should not be considered until [respondent-mother] has demonstrated a commitment to recovery

> and documented sobriety for at least 9 months, particularly given the seriousness and longstanding nature of her addictions. She needs to show an ability to perform in a stable job or jobs over a similar period of time, without being fired or laid off due to relationship or job performance issues. [Respondent-mother] would also need to have the financial resources to support her children and to have stable and safe housing.

(Portions of original in all caps and in bold.) The trial court thus found that it could consider reunification if respondent-mother overcame her substance abuse and secured stable employment and housing in the next nine months. Should the trial court conclude it has subject matter jurisdiction on remand, it should determine whether respondent-mother has continued to make progress in the areas of domestic violence, mental health, and substance abuse and reexamine this issue of reunification in accordance with N.C. Gen. Stat. § 7B-906.1(d)(3).

E. Visitation

[6] Respondent-mother next argues that the trial court's findings of fact do not support its conclusion of law that "[i]t is in [James's] best interest to have minimal visitation with Respondent mother." But Findings of Fact 3, 5, 6, and 7, as quoted and discussed above, demonstrate that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse. The trial court's findings of fact thus support this conclusion of law.

[7] Respondent next challenges the visitation plan entered by the trial court under N.C. Gen. Stat. § 7B-905.1(c) (2013) on the ground that it fails to specify the duration of her visitation with James. The statute requires "any order providing for visitation [to] specify the minimum frequency *and length* of the visits and whether the visits shall be supervised." N.C. Gen. Stat. § 7B-905.1(c) (emphasis added). The permanency planning order merely provides: "[Respondent-mother] shall have monthly visitation in North Carolina with [James] supervised by the [grandparents] at a location of their choice. [Respondent-mother] shall give sufficient notice to the [grandparents] of her intent to exercise visitation." The order fails to establish the duration of respondent-mother's monthly visitation. Should the trial court reconsider this issue on remand, we direct it to comply with N.C. Gen. Stat. § 7B-905.1(c). *See In re T.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 207, 219 (2014).

F. Waiver of Further Review Hearings

[8] Respondent-mother contends that the trial court erred in waiving subsequent permanency planning hearings under N.C. Gen. Stat. § 7B-906.1(n), because James had not "resided in the placement for a period of at least one year" at the time of the permanency planning hearing. *See* N.C. Gen. Stat. § 7B-906.1(n)(1). Subsection (n) provides that a court may waive further hearings only "if the court finds by clear, cogent and convincing evidence" each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

Id. § 7B-906.1(n). "The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error." *P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 249.

Here, the trial court failed to make any findings in support of the first, third, and fourth criteria set forth in N.C. Gen. Stat. § 7B-906.1(n). And it would have been impossible for the trial court to make a finding as to the first criterion, because James had not resided with his maternal grandparents for at least one year at the time of the 8 January 2015 hearing or at the time the trial court entered its 23 February 2015 permanency planning order. Should the trial court reconsider this issue, we direct it to comply with N.C. Gen. Stat. § 7B-906.1(n).

IV. Conclusion

We vacate the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015

permanency planning order and remand for further proceedings consistent with this opinion. We also deny the GAL's motion to dismiss.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

JEANNE LUND, PLAINTIFF
v.
ROBERT LUND, DEFENDANT

No. COA15-175

Filed 1 December 2015

1 Divorce—equitable distribution—pension—valuation

The trial court properly valued and distributed a wife's pension from the State of North Carolina in an equitable distribution action. A CPA who had determined a present value for the pension had testified that an affidavit prepared by the Retirement Systems Division of the Department of State Treasurer was the type of information that an expert would rely upon; the trial court expressly stated in its order that it was valuing the pension as of the date of the parties' separation and not as of the date of the affidavit; and the fact that it contained data after the date of the separation went to its weight and not to its admissibility.

2. Divorce—equitable distribution—pension—distribution method

The trial court did not abuse its discretion in an equitable distribution action by utilizing both the present value and the fixed percentage value as distribution methods for the wife's State employee pension.

3. Divorce—equitable distribution—debt—classification—marital

The trial court's classification of debt as marital in an equitable distribution action was supported by the evidence.

4. Divorce—equitable distribution—value of marital home

The trial court erred in an equitable distribution action by finding that no evidence was presented concerning the value of the marital home as of the date of distribution and further in failing to

make any findings based on the competent evidence that was presented. The wife presented evidence that the value of the marital home increased by the date of distribution, but she did not testify about whether she believed the increase was passive or active. Any increase or decrease in value during the relevant time is presumed to be passive and therefore divisible.

5. Divorce—equitable distribution—rental income during separation—classification

The wife argued in an equitable distribution action that the trial court erred by not classifying and awarding certain rental income generated by the marital home during the separation. The trial court classified the rental income as divisible property when it determined that the husband's mortgage payments and costs associated with a refinance more than offset any divisible credit that might be due to wife by virtue of rental income received by the husband. Furthermore, the court made a distribution of the rental income to the husband.

6. Divorce—equitable distribution—post-separation payments—classification

An error in an equitable distribution case in the classification of certain post-separation payments by the husband did not necessitate reversal or remand. Even though the trial court did incorrectly classify interest payments made by the husband on a Home Depot account and a credit card account as divisible properly where the order did not state when the husband made the payments, the trial court had the authority to reimburse the husband for his post-separation interest payments.

7. Divorce—equitable distribution—mortgage payment—distributional factor

There was no reversible error in an equitable distribution case where the trial court characterized a mortgage payment made by the husband on the marital home as divisible property, even thought it was not divisible, where there was nothing in the order to suggest that the trial court treated the mortgage payment as divisible property. Instead, the trial court considered it as a distributional factor in the award of rental payments received by the husband after the date of separation.

8. Divorce—equitable distribution—tax refunds—classification

Assuming that the trial court erred in an equitable distribution action by classifying as divisible two tax refunds belonging

to the wife that were applied to the parties' tax liability, any error was harmless to the wife because she received the credit for the amounts of the refunds.

9. Divorce—equitable distribution—equal distribution

The trial court did not abuse its discretion in an equitable distribution action by determining that an equal distribution was equitable based on extensive findings and ample supporting record evidence, notwithstanding the wife's evidence to the contrary.

Appeal by Plaintiff from order entered 11 August 2014 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 27 August 2015.

Mary Elizabeth Arrowood for the Plaintiff-Appellant.

Siemens Family Law Group, by Ana M. Prendergast and Jim Siemens, for the Defendant-Appellee.

DILLON, Judge.

Jeanne Lund ("Wife") appeals from an equitable distribution order. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

Wife and Robert Lund ("Husband") were married on 14 February 1997 and separated on 5 January 2013. Following their separation, Wife sued Husband for equitable distribution, seeking an *unequal* distribution of the marital estate. Husband answered and counterclaimed for equitable distribution, seeking an *equal* distribution of the marital estate. On 11 August 2014, following a four-day trial, the trial court entered an equitable distribution order, dividing the marital estate substantially *equally*. Wife timely appealed.

II. Analysis

Wife argues on appeal that the trial court erred in (1) classifying, valuing, and distributing certain marital property, including her pension benefits and three debts incurred during the marriage; (2) classifying, valuing, and distributing certain divisible property; and (3) determining that an equal distribution of the marital property was equitable.

"In applying our equitable distribution statutes, the trial court must follow a three-step procedure, (1) classification, (2) []valuation and (3) distribution." *Seifert v. Seifert*, 82 N.C. App. 329, 334, 346 S.E.2d 504, 506 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).

Property may be *classified* as marital, divisible, or separate. N.C. Gen. Stat. §§ 50-20(a), (b) (2014). Only marital or divisible property must be *valued* and then *distributed* to the parties by the trial court. *Id.* § 50-20(c).

Regarding valuation, marital property is *valued* as of the date of separation, *see Davis v. Davis*, 360 N.C. 518, 526-27, 631 S.E.2d 114, 120 (2006), which in the present case was 5 January 2013, while divisible property is *valued* as of the date of distribution, *see* N.C. Gen. Stat. § 50-21(b) (2014), which in the present case was 11 August 2014.

Once the marital and divisible property is appropriately valued, the trial court is to *distribute* this property equitably. N.C. Gen. Stat. § 50-20(a) (2014).

A. Marital Property

Wife argues that the trial court erred in its handling of certain marital property and marital debt. We address each argument in turn.

1. State Pension

Wife is employed by the State of North Carolina where she has earned and continues to earn compensation in the form of future pension benefits.

In *classifying* a pension, it must be remembered that *any* compensation earned by a spouse during marriage (i.e., before the date of separation) is presumed to be marital property. N.C. Gen. Stat. § 50-20(b)(1) (2014). In accordance with this general rule, the right to receive pension benefits that are *earned* during the marriage (i.e., before the date of separation) is presumed to be marital property, even though the pension benefits are not to be *received* until well after the date of separation. *See id.* (defining "marital property" to include "vested and nonvested pension . . . rights").

Absent an agreement between the parties, there is only one method under North Carolina law by which a vested pension may be *valued* by the trial court. This method involves the five-step process outlined by our Court in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994). By this process, the "present value" of the pension is established as of the date of separation. *Id.* at 731, 440 S.E.2d at 595-96.

Absent an agreement between the parties, there are only two methods by which a vested pension may be *distributed* by the trial court, which are codified in N.C. Gen. Stat. § 50-20.1(a)(3) and (a)(4). *See id.* at 731-32, 440 S.E.2d at 596. The first method, referred to in *Bishop* as "the present value . . . [or] [] immediate offset method," is codified in N.C. Gen. Stat. § 50-20.1(a)(3) and allows the trial court to award one hundred percent (100%) of the future pension benefits to the employee-spouse and to "offset" this award by awarding a larger percentage of *the other* marital assets to the non-employee spouse. *See id.* The second method, referred to in *Bishop* as "the fixed percentage . . . or [] deferred distribution method," is codified in N.C. Gen. Stat. § 50-20.1(a)(4) and allows the trial court to award the non-employee spouse a "fixed percentage" of the marital portion of the pension benefits as they are paid out in the future. *See id.* at 732, 440 S.E.2d at 596.

Here, Husband and Wife stipulated to the *classification* of Wife's pension earned *as of the date of separation* as being entirely marital, since Wife had no years of service with the State prior to the marriage.[1] Wife, however, makes several arguments concerning the trial court's *valuation* and *distribution* of her pension. For the reasons set forth below, we hold that the trial court properly valued and distributed Wife's pension.

a. Valuation

[1] The trial court determined that Wife's future pension benefits had a present value of $199,823 as of the date of separation, largely relying upon the expert opinion of a certified public accountant ("CPA") tendered as an expert by Husband. The evidence tended to show and the trial court found that the CPA applied the *Bishop* five-step process to arrive at his opinion of value. Wife, however, makes two arguments attacking the trial court's valuation of her pension:

First, Wife argues that the CPA's opinion was incompetent because the CPA relied upon information which was never admitted into evidence and was otherwise inadmissible hearsay. We disagree.

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). We review the trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (1988).

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1. Of course, when Wife ultimately retires in the future, her pension benefits that will ultimately be paid out will *not* be entirely marital because she will have continued earning these benefits as she continues to work after the date of separation.

In the present case, the *information* primarily relied upon by the CPA consisted of an affidavit prepared by the Retirement Systems Division of the Department of State Treasurer, which contains specific data about Wife's rights to her State pension and the amount of her expected benefit (the "State affidavit").

It is true, as Wife contends, that the State affidavit was never formally offered into evidence and was, otherwise, hearsay. It is also true that North Carolina *used to* follow the rule that "an expert witness cannot base his opinion on hearsay evidence . . . [or] facts [not] supported by [the] evidence[.]" *Cogdill v. North Carolina State Highway Comm'n*, 279 N.C. 313, 327, 182 S.E.2d 373, 381 (1971). However, as our Supreme Court has more recently observed, this "general rule has undergone significant modification in recent years[.]" *State v. Huffstetler*, 312 N.C. 92, 106, 322 S.E.2d 110, 119 (1984). For instance, Rule 703 of our Rules of Evidence, which was adopted in 1983, *see* 1983 N.C. Sess. Laws 701, § 3, allows "an expert [to] give his opinion based on facts *not otherwise admissible in evidence* provided that the information considered by the expert is of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject," *see State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988) (emphasis added).

Here, the CPA testified that the State affidavit is the type of information that an expert would rely upon to value a pension, since it contains the data specific to a particular employee's pension needed to apply the five-step process outlined in *Bishop*. Further, the trial court determined that it was proper for the CPA to rely on the State affidavit, "pursuant to Rule of Evidence 703." In challenging this determination, Wife contends that the types of information falling within the ambit of Rule 703 include the National Vital Statistics Report published by the U.S. Department of Health and Human Services. The CPA, however, expressly testified that he *did* rely on the National Vital Statistics Report in determining the life expectancy of Wife, which is data that an expert needs to value a pension pursuant to *Bishop*. But the types of information cited by Wife would not contain *other* data an expert would need to make a *Bishop* evaluation, e.g., specific data about the employee-spouse's earnings, retirement dates which is found in the State affidavit. In any event, Wife points to no evidence tending to show that the State affidavit was not also a type of information relied upon by experts in the field of pension valuation. Wife's argument is overruled.

Second, Wife argues that the State affidavit was not reliable because it contained data regarding Wife's pension as of 1 February 2013, and

not as of the actual date of separation, 5 January 2013. However, we hold that this mere twenty-seven (27) day discrepancy goes to *weight* and not *admissibility*. *See, e.g.*, *Northgate Shopping Ctr., Inc. v. State Highway Comm'n*, 265 N.C. 209, 211-12, 143 S.E.2d 244, 245-46 (1965) (stating that evidence of value from a date other than the relevant date may still be admissible if the "other" date was not too remote in time); *City of Wilson v. Hawley*, 156 N.C. App. 609, 615, 577 S.E.2d 161, 165 (2003) (recognizing that expert witnesses "must be given wide latitude in formulating and explaining their opinions as to value"). Therefore, the CPA's opinion of value as of the date of separation was not rendered incompetent merely because he relied upon the State affidavit. We note that the trial court expressly stated in its order that it was valuing the pension "as of the date of the parties' separation," and not as of the date of the State's affidavit.

b. Distribution

[2] Regarding the *distribution* of the pension, the trial court awarded Husband ten percent (10%) of the marital portion of Wife's future pension benefit payments, calculated as follows:

> 10% of the marital portion of [Wife's] NC state pension, said [marital] portion to be determined by coverture fraction, the numerator of which is the months of NC state employment during marriage and the denominator of which is [the] total months of NC state employment, when that pension goes into pay status, with the amount to be determined by [Wife's] earnings preceding date of separation, as opposed to her last years of employment.

We hold that this award complies with N.C. Gen. Stat. § 50-20.1. Specifically, the pension is a defined benefit plan; and the trial court correctly classified the marital portion of Wife's future pension benefit payments by employing the coverture fraction, mandated in N.C. Gen. Stat. § 50-20.1(d). By using the coverture fraction, the trial court recognized that a portion of these future benefits will be Wife's separate property, as she will continue working to earn these benefits after the date of separation.[2] After valuing the pension per *Bishop*, the trial court distributed the

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2. The numerator of the coverture fraction is the number of years during marriage (i.e., before separation) the future benefits were earned, and the denominator is the *total* number of years the benefits were earned. *See Seifert v. Seifert*, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987); *Bishop v. Bishop*, 113 N.C. App. 725, 729-30, 440 S.E.2d 591, 595 (1994).

marital portion of the pension by awarding Husband a fixed percentage of the marital portion of those future benefit payments, which is allowed by N.C. Gen. Stat. § 50-20.1(a)(3). Husband, though, was awarded only ten percent (10%) of the marital portion of the pension benefits, whereas the trial court determined that a fifty-fifty split of the entire marital estate was equitable. The trial court, however, awarded a larger share of the *other* marital assets to Husband as an offset to achieve equity, which is allowed by N.C. Gen. Stat. § 50-20.1(a)(4). Therefore, the trial court utilized *both* distribution methods, which we hold was not an abuse of the trial court's discretion in this case.

Wife argues that the trial court should have used *only* the fixed percentage method in distributing the pension. That is, she argues that the trial court should have distributed the marital portion of the pension fifty-fifty and also the other marital assets fifty-fifty. She contends that the non-pension assets are preferable because her future pension benefits are "speculative" at best. She contends that the order allows Husband to receive the marital house, an IRA that *she* built up during marriage, and other "present" assets, which he can currently enjoy, leaving her with almost nothing from the marital estate except a hope to receive pension benefits sometime in the future. While Wife's concern is a factor the trial court could have considered in distributing the marital estate, we cannot say that the trial court abused its discretion in distributing the marital assets in the manner it did. There is nothing in the statute which *requires* the trial court to apply the fixed percentage method exclusively when the pension makes up a large percentage of the marital estate. Therefore, Wife's argument is overruled.

Wife further argues that the trial court committed the same error that occurred in *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). Wife's argument is misplaced. In *Seifert*, the trial court erred because, in awarding the non-employee spouse a portion of her husband's future pension benefits, it did not award her a fixed percentage of those future benefits, but rather awarded her a specific dollar amount (equal to the present value of her portion of her husband's pension) *to be paid from her husband's future benefits*. *See Seifert*, 82 N.C. App. at 338, 346 S.E.2d at 509. The Supreme Court recognized that this methodology was error because it amounted to a double discounting. *Seifert*, 319 N.C. at 371, 354 S.E.2d at 509-10. Here, though, the trial court did not engage in double discounting. It properly determined the present value of the pension as of the date of separation as mandated by *Bishop*, and awarded

Husband a f*ixed percentage* of Wife's future benefits.[3] Wife's argument is overruled.

2. Marital Debt

[3] Wife contests the competency of the evidence to support the trial court's classification of the following debts as marital: (1) debt related to Husband's construction business in the amount of $5,931.67; (2) tax debt for the 2012 tax year of $2,495.00; and (3) credit card debt from a Discover card in the amount of $8,894.15. We disagree.

As to whether property, or by extension, debt, "is marital or separate, the findings of the trial court will not be disturbed on appeal if there is competent evidence to support the findings." *Loving v. Loving*, 118 N.C. App. 501, 507, 455 S.E.2d 885, 889 (1995). This is true "despite the existence of evidence to the contrary." *Johnson v. Johnson*, ___ N.C. App. ___, ___, 750 S.E.2d 25, 27 (2013). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, ___ N.C. App. ___, ___, 757 S.E.2d 494, 499 (2014).

Regarding Husband's construction business debt, Husband testified that he operated a construction business as a sole proprietor during the marriage and that, as of the date of separation, he owed $5,931.67 to four specific suppliers and subcontractors, identifying each creditor by name and the specific amount owed to each. The parties stipulated that Husband's construction business was a marital asset. Though there may have been evidence to the contrary, we hold that there was sufficient evidence to support the trial court's finding that Husband's construction business debt was marital.

Regarding the 2012 tax debt, Husband testified that there was owed $2,495.00 in federal taxes for that year. He testified that he had paid taxes for 2012, but that he mistakenly underpaid them. The parties were not separated until 2013. Therefore, we hold that there was competent evidence to support the trial court's finding that the 2012 tax debt was marital.

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3. The trial court determined that the pension had a value of $199,823 as of the date of separation. The court would have committed the double discounting error that occurred in *Seifert* if, in awarding Husband ten percent (10%) of the pension, it had awarded Husband $19,982.30 (10% of the pension value) *and had* required Husband to wait until Wife began drawing her pension to receive this award. However, the trial court avoided this error by awarding Husband this future benefit as a *fixed percentage* (rather than a specific dollar amount).

Regarding the Discover credit card debt, Husband testified that he and Wife used the Discover card to purchase a refrigerator and that the other debt likely arose from the construction business, which, as previously stated, both parties stipulated was marital. Husband testified that the balance of the Discover card was $8,895.84 as of a statement date of 20 January 2013. As the parties' date of separation was 5 January 2013, we hold that the trial court's finding of the marital credit card debt from the Discover card was supported by competent evidence.

B. Divisible Property

Wife makes a number of arguments concerning the trial court's treatment of certain divisible property. N.C. Gen. Stat. § 50-20(b)(4) defines "divisible property" to include the following:

> a. [Passive] appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution . . . .
>
> . . .
>
> c. Passive income from marital property received after the date of separation . . . .
>
> d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

N.C. Gen. Stat. § 50-20(b)(4) (2014).

1. Increase in Value of Marital Home

[4] Under N.C. Gen. Stat. § 50-20(b)(4)(a), passive increases or decreases in the value of the marital home between the date of separation and the date of distribution are considered divisible. Therefore, passive increases in the value of the marital home must be distributed by the trial court as divisible property. *See id.*

In the present case, the trial court valued the marital home at $267,000.00 as of the date of separation and distributed it to Husband. The trial court found that neither party presented evidence regarding the value of the marital home as of the date of distribution. Therefore, the court concluded that there was no divisible property in connection with the marital home as there was no evidence showing that there was any increase or decrease in the value of the marital home during the relevant time period.

Wife contends, however, that she *did* introduce evidence showing that the value of the marital home increased to $300,000.00 by the date of distribution. Specifically, she testified at the trial (two months before the date of distribution) that she believed the marital home was worth $300,000.00. "[W]here the value of real property is a factual issue in a case, our Supreme Court has repeatedly held that the owner's opinion of value is competent to prove the property's value." *United Cmty. Bank v. Wolfe*, ___ N.C. App. ___, ___, 775 S.E.2d 677, 680 (2015).[4] We recognize that Wife did not testify whether she believed that the increase in value was "passive" or "active" in nature, as only a passive increase would be classified as divisible. However, she was not required to do so since *any* increase (or decrease) in value during the relevant time period is *presumed* to be passive in nature and, therefore, divisible property. *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008).[5] Of course, this presumption is rebuttable. *Id.*

Husband counters by arguing that we should read the trial court's finding that "no evidence" was presented to mean that "no competent evidence" was presented by either party on the issue. However, such a finding would also have been error, since Wife's testimony was competent. *United Cmty. Bank*, *supra*.

We note that a finding by the trial court of "no *credible* evidence" being presented on the issue would not have been error, since the trial court is free to give any weight (or no weight) to any evidence presented. *See Bodie v. Bodie*, 221 N.C. App. 29, 38, 727 S.E.2d 11, 18 (2012). Nevertheless, we cannot discern this meaning from the present order. For instance, the trial court never makes mention in the order of Wife's testimony concerning her opinion of value, only referencing the opinions of the three appraisers who testified; and nothing in the order otherwise suggests that the trial court found Wife's testimony as not being "credible," much less that the court even considered it.

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4. There is an exception to this general rule where "it affirmatively appears that the owner does not know the market value of his property[.]" *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974). Furthermore, "an owner's opinion is not competent where it is shown that the owner's opinion is not really his own but is based entirely on the opinion of others." *Wolfe*, ___ N.C. App. at ___, 775 S.E.2d at 680, n. 2.

5. Wife also contends that the testimony of her expert who valued the home as of eight (8) months before the date of distribution was some evidence to establish the home's value as of the date of distribution. However, as we have concluded that Wife's opinion of value was competent to establish the marital home's value as of the date of distribution, we need not reach whether the expert's opinion was as of a date too remote from the date of distribution to be considered competent, as a matter of law.

We thus hold that the trial court erred in finding that "no evidence" was presented concerning the value of the marital home as of the date of distribution and further in failing to make any findings based on the competent evidence that was presented, and we remand for the trial court to make further findings on this issue. *See Edwards v. Edwards*, 152 N.C. App. 185, 189, 566 S.E.2d 847, 850 (2002) (remanding for findings where there was evidence that marital real property had increased in value during the period of separation before the date of distribution and the trial court made no findings regarding any change in value). On remand, the trial court is free to give any weight (or no weight) to the competent evidence, including Wife's testimony, that was presented. *Bodie*, *supra*. If, on remand, the trial court determines that there is divisible property to be valued and distributed, then the trial court may "revise its order distributing the parties' marital [and divisible] property" in order to achieve a division that is equitable. *Edwards*, 152 N.C. App. at 189, 566 S.E.2d at 850.

2. Rental Income from the Marital Home

[5] Wife argues that the trial court erred in not classifying and awarding certain rental income generated by the marital home during the separation. Specifically, Wife contends that certain rental payments generated by the marital home during the period of separation were divisible property.

It is true, as Wife argues, that the rental income represents passive income from marital property and, therefore, is divisible pursuant to N.C. Gen. Stat. § 50-20(d)(4)(c). However, we hold that the trial court did classify the rental income as "divisible" property. Specifically, the trial court determined that "[Husband's] mortgage payments and costs associated with the refinance more than offset *any divisible credit* that might be due to [Wife] by virtue of . . . rental income received by [Husband]." (Emphasis added.) Further, the court made a distribution of this rental income to Husband, based on its finding that Husband had incurred refinancing costs and made mortgage payments.

3. Post-separation Payments

[6] Wife argues that the trial court erred in finding certain post-separation payments to be divisible property, pointing to the 2013 amendment to the definition of "divisible" property in N.C. Gen. Stat. § 50-20. Specifically, N.C. Gen. Stat. § 50-20(b)(4) defines divisible property to include, in part, "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt." *See* N.C. Gen. Stat. § 50-20(b)(4)(d) (2014). We hold that this statutory language

excludes from the definition of divisible property *non-passive* increases and decreases in marital debt and *non-passive* increases and decreases in financing charges and interest related to marital debt which occurred on or after 1 October 2013, the effective date of the 2013 amendment. *See Cooke v. Cooke*, 185 N.C. App. 101, 108, 647 S.E.2d 662, 667 (2007) (holding that amendment to definition of divisible property in N.C. Gen. Stat. § 50-20(b)(4)(d) applies only to post-separation payments toward marital debt which occurred *after* the effective date of the amendment); *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (same).[6]

First, Wife contends that the trial court incorrectly classified interest payments made by Husband on the Home Depot account and on the Discover Card as divisible property. We note that the order does not state *when* Husband made these payments. In any event, we agree with Wife that any payments made by Husband *after* 1 October 2013 should not have been classified as divisible, as they constituted *active* decreases in interest related to marital debt. However, like in *Cooke*, the error "does not necessitate reversal or remand . . . [as] the trial court had authority to reimburse [Husband] for [his] post-separation [interest] payments[.]" 185 N.C. App. at 108, 647 S.E.2d at 667.[7]

[7] Second, Wife contends that the trial court incorrectly characterized a $1,325.00 mortgage payment by Husband on the marital home in May 2014 as divisible property. Wife is correct that this mortgage payment is not divisible since it was made after the effective date of the 2013 amendment. However, there is nothing in the order to suggest that the trial court treated this mortgage payment as divisible property. Rather, the order suggests that the trial court considered the mortgage payment as a distributional factor in the award of the rental payments received by Husband after the date of separation on the marital home. Wife's argument is overruled.

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6. The *Cooke* and *Warren* cases applied a 2002 amendment to the definition of the divisible property pertaining to post-separation payments towards marital debt. Though the 2013 amendment rather than the 2002 amendment applies to the present case, the same reasoning applies; and, therefore, we are compelled to follow *Cooke* and *Warren*.

7. We need not reach whether it would be reversible had the trial court made the *opposite* error by *failing* to classify the interest payments made *before* 1 October 2013 as divisible. That is, Wife is not contending that the trial court *failed* to value and distribute certain divisible property. *Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005) (holding that the trial court must "value all marital and divisible property . . . in order to reasonably determine whether the distribution ordered is equitable"). Rather, she is contending that the trial court valued and distributed certain property that *should not have been* classified as divisible.

[8] Finally, Wife contends that the trial court erred in classifying as divisible two tax refunds belonging to her which were applied to the parties' tax liability for the 2011 tax year. Specifically, the trial court stated that these tax refunds were Wife's separate property and effectively treated the use of these refunds towards the marital tax debt as divisible property, and awarded Wife a credit for the amounts of these refunds. Assuming, however, that the trial court erred, we hold that any error was harmless to Wife, as she benefited as it was *she* who received the credit.

C. Equal Distribution

[9] Finally, Plaintiff argues that the trial court erred in determining that an equal distribution of the marital estate was equitable. However, we hold that the trial court did not abuse its discretion in this regard.

Our Supreme Court has stated that the public policy of this State "so strongly favor[s] the equal division of marital property that an equal division is made *mandatory* unless the court determines that an equal division is not equitable." *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (emphasis in original) (internal marks omitted). Therefore, "[t]he party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable." *Armstrong v. Armstrong*, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988).

Wife argues that she offered extensive evidence to support an unequal distribution award. We have held that where "evidence is presented from which a reasonable finder of fact could determine that an []equal division would be inequitable, a trial court is required to consider the factors set forth in [N.C. Gen. Stat.] § 50-20(c)." *Atkinson v. Chandler*, 130 N.C. App. 561, 566, 504 S.E.2d 94, 97 (1998). Wife does not make any specific argument concerning any failure by the trial court to consider any of the statutory factors.

Our review is limited to "whether there was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* Accordingly, based on these extensive findings and the ample record evidence in support of them, notwithstanding Wife's evidence to the contrary, we hold that the trial court did not abuse its discretion in determining that an equal distribution was equitable. Therefore, this argument is overruled.

III. Conclusion

We reverse the trial court's finding that neither party introduced evidence of the existence of divisible property associated with any passive increase (or decrease) in value of the marital home during the period of separation, and we remand for more findings on this issue. After considering these issues on remand, the trial court may "revise its order distributing the parties' marital [and divisible] property" in order to achieve a division that is equitable. *Edwards*, 152 N.C. App. at 189, 566 S.E.2d at 850. With respect to Wife's remaining arguments, we affirm the trial court's order.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges HUNTER, JR., and DIETZ concur.

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR, DEFENDANT

No. COA14-490-2

Filed 1 December 2015

Constitutional Law—pre-arrest silence—no interview with officer—admissible

The trial court did not err in admitting testimony that the investigating detective was not able to question defendant. Pre-arrest silence has no significance if there is no indication that defendant was questioned by a law enforcement officer and refused to answer.

Appeal by defendant from judgments entered 16 September 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Originally heard in the Court of Appeals 8 October 2014, with opinion filed 16 December 2014. An opinion reversing the decision of the Court of Appeals for reasons stated in the dissenting opinion and remanding for consideration of defendant's remaining issue on appeal was filed by the Supreme Court of North Carolina on 25 September 2015.

Attorney General Roy Cooper, by Associate Attorney General Melody Hairston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant.

BRYANT, Judge.

Testimony that the investigating detective was unable to reach defendant to question him during her investigation was admissible to describe the course of her investigation, and was not improper testimony of defendant's pre-arrest silence.

A fuller factual background can be found in *State v. Taylor*, ___ N.C. App. ___, 767 S.E.2d 585 (2015), *rev'd*, ___ N.C. ___, 776 S.E.2d 680 (2015). On remand from the Supreme Court to address an issue raised by defendant but not previously addressed by this Court regarding defendant's pre-arrest silence, we include only those facts necessary to a resolution of that issue.

In October 2010, Bo Anderson Taylor ("defendant") and his girlfriend Gail Lacroix moved in with defendant's sister Crystal Medina ("Medina"). Medina said defendant could stay in the shop in her backyard. Medina's backyard had locked green and white trailers which contained lasers, generators, and other tools.

In November 2010, Medina found a pawn ticket in her truck which indicated that defendant had pawned one of her lasers. Medina confronted defendant, showed him the pawn ticket, and asked if defendant had taken anything else from her. Defendant denied knowledge of the ticket and refused to respond to her questions.

Following this confrontation, Medina left her home to take her daughter to a doctor's appointment. Upon her return, she found that defendant and Lacroix had moved out. Medina entered the building where defendant and Lacroix had been staying and discovered another pawn ticket.

Medina contacted the New Hanover County Sheriff's Office and reported that defendant had stolen several items from the trailers in her backyard. The case was assigned to Detective Angie Tindall, who conducted an investigation and confirmed that the items had been pawned by defendant. The pawn tickets and video from the pawn shops confirmed that defendant had pawned a Bosch drill, a portable air compressor, two generators, and two lasers, in exchange for a total amount of $585.00 in loans from various pawn shops. Defendant had signed the pawn tickets associated with each of the items indicating that he was

the owner of the items. Detective Tindall attempted several times to contact defendant, but was unsuccessful in doing so.

Defendant was arrested, tried, and convicted by a jury of misdemeanor larceny, breaking and entering, and five counts of obtaining property by false pretenses. The court consolidated the offenses into three judgments, imposing consecutive active terms of 8 to 10 months, 11 to 14 months, and 11 to 14 months.

On remand, we address defendant's argument that the trial court allowed the State to introduce extensive and repetitive testimony in its case-in-chief that defendant exercised his pre-arrest right to silence, and that because such testimony was not for the purpose of impeachment, the trial court committed plain error. We disagree.

Specifically, defendant asserts that when the trial court allowed testimony from Detective Tindall related to defendant's silence in the face of her investigative inquiries, he was deprived of any benefit of his right to silence. Defendant did not object to Detective Tindall's testimony at trial; therefore, the appropriate standard of review is plain error. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 173 (2010) (quoting *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (2008)). "[A] defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* at 395, 698 S.E.2d at 174 (citing *Boston*, 191 N.C. App. at 649 n.2, 663 S.E.2d at 894 n.2).

Here, during her testimony on direct examination by the State, Detective Tindall discussed her lack of questioning or inability to question defendant during the course of her investigation:

> THE STATE: And did you try to get in touch with the defendant?
>
> TINDALL: Yes, I did.
>
> THE STATE: How?
>
> TINDALL: Telephone.

THE STATE: Did you call him?

TINDALL: I would call a family member and he was not there, called another family member, he's not there, and another family member, here's [sic] not there.

THE STATE: Did the defendant ever make contact with you?

TINDALL: No.

THE STATE: Did the defendant ever speak to you?

TINDALL: No.

THE STATE: Did the defendant ever turn over any pawn slips to you?

TINDALL: No.

THE STATE: Did the defendant ever assist you in locating any of the property?

TINDALL: No.

THE STATE: In fact, how did you locate the pawn slips [Medina] gave you?

TINDALL: The Sheriff's Office has a system called Pawn Watch in which we enter items into the Pawn Watch or through PTP, which is Police to Police, we put in names or serial numbers for a match in the system. Pawn shops are required to report all items pawned or sold.

THE STATE: So you had to search those items out?

TINDALL: Yes.

THE STATE: And that information you have is based on the serial numbers that [Medina] provided you?

TINDALL: Uh-huh.

THE STATE: At any point did you ever question this case, this has a lot of family drama?

TINDALL: Yes.

THE STATE: What made you go forward?

TINDALL: [Medina] seemed to be telling me the truth, she

gave me all the information possible that she had and we are required to investigate everything to the fullest.

THE STATE: In fact, did you even go investigate [Medina]?

TINDALL: Yes.

THE STATE: How did you do that and why?

TINDALL: A family member advised me that [defendant] was asked to pawn the items for [Medina], that [Medina] had stolen [f]ive [h]undred [d]ollars from her employer. I investigated that and learned that there was no evidence of this occurring, so, therefore, [Medina] was never charged and I had no evidence.

. . .

THE STATE: You stated that you had tried to speak to the defendant?

TINDALL: Yes.

THE STATE: Did you leave a number for the defendant?

TINDALL: Yes.

THE STATE: Did you leave messages for the defendant?

TINDALL: Through family members, yes.

THE STATE: And did he ever call you back?

TINDALL: No.

THE STATE: Has he ever given you any information?

TINDALL: No.

Defendant cites to a number of cases which we acknowledge discuss the issue of pre-arrest silence. *See State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012) (noting defendant's right to silence would be "destroyed" if he could be penalized for relying on it); *Mendoza*, 206 N.C. App. at 396–98, 698 S.E.2d at 174–76 (finding error where a state trooper made two comments at different points in his testimony regarding a defendant's pre-arrest silence); *Boston*, 191 N.C. App. at 651, 663 S.E.2d at 896 (holding the prosecution may not comment on a defendant's pre-arrest silence or use it is as substantive evidence of his guilt).

However, none of these cases recognize the principle of pre-arrest silence where there has been no direct contact between the defendant

and a law enforcement officer. Pre-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer. Here, the evidence showed this was an investigation into a family matter where at least one family member told the investigator the sister who reported the crime against defendant had in fact asked defendant to pawn the items the sister reported as stolen. Throughout the investigation of this "family drama," Detective Tindall talked with several family members and tried a number of times to reach defendant through other family members but defendant did not respond. The testimony at issue revealed that Detective Tindall was not able to make contact with defendant at all, much less confront him in person and request that he submit to questioning. Additionally, there was no indication in Detective Tindall's direct testimony that defendant knew she was trying to talk to him and that he refused to speak to her.[1] Thus, it cannot be inferred that defendant's lack of response to indirect attempts to speak to him about an ongoing investigation was evidence of pre-arrest silence.

Based on the record in this case, we hold that the testimony at issue here was admitted to show Detective Tindall's multiple attempts to make contact with defendant during the course of her investigation of this family dispute. Nothing in Detective Tindall's testimony shows pre-arrest silence by defendant in response to police questioning. Therefore, the trial court did not err in admitting this testimony. Accordingly, defendant's plain error argument is overruled.

NO PLAIN ERROR.

Judges Elmore and Hunter, Jr., concur.

1. Defendant, in his testimony, said he was aware that Detective Tindall tried to speak to him, but did not indicate at what point in time he became aware. Defendant said he came forward and turned himself in to another detective.

STATE OF NORTH CAROLINA
v.
ROBERT T. WALSTON, SR., DEFENDANT

No. COA12-1377-3

Filed 1 December 2015

1. Evidence—expert testimony—sexually abused children—reliability of children's statements in general

In a prosecution for rape and other offenses against two children three to four years old and six to seven years old that did not occur until the victims were twenty-seven and twenty-nine years old, the trial court improperly excluded the testimony of an expert (Dr. Artigues) based upon the erroneous belief that her testimony about the suggestibility of children was inadmissible as a matter of law. It was not required that Dr. Artigues personally examine the children in order to testify as she did in voir dire. Expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 of the Rules of Evidence are met. As with any proposed expert opinion, the trial court should use its discretion, guided by Rules 702 and 403, to determine whether the testimony should be allowed in light of the facts before it.

2. Evidence—scientific—standards for admission

Because scientific understanding of any particular issue is constantly advancing and evolving, courts should evaluate the specific scientific evidence presented at trial and not rigidly adhere to prior decisions regarding similar evidence with the obvious exception of evidence that has been specifically held inadmissible—results of polygraph tests, for example. Even evidence of disputed scientific validity will be admissible pursuant to Rule 702 so long as the requirements of Rule 702 are met. The reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion.

Appeal by Defendant from judgments entered 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County. Heard originally in the Court of Appeals 21 May 2013, and opinion filed 20 August 2013.

Reversed and remanded to the Court of Appeals by the North Carolina Supreme Court in an opinion rendered on 19 December 2014, and second Court of Appeals opinion filed 17 February 2015. Remanded to the Court of Appeals by the North Carolina Supreme Court in an order rendered 24 September 2015, for re-consideration in light of *State v. King*, 366 N.C. 68, 366 S.E.2d 535 (2012).

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery for Defendant-Appellant.

McGEE, Chief Judge.

Robert T. Walston, Sr. ("Defendant") was indicted for offenses involving two sisters, E.C. and J.C. (together "the children"),[1] alleged to have occurred between June 1988 and October 1989, when J.C. was three to four years old and E.C. was six to seven years old. In 1994, the children were interviewed by "law enforcement and/or Social Services[.]" The children did not report the offenses for which Defendant was later convicted. The children testified at Defendant's 2012 trial, stating that each had informed the other in January 2001 of having been sexually assaulted by Defendant during the June 1988 to October 1989 time period. They also informed their parents at that time, but law enforcement was not contacted.

J.C. decided to contact law enforcement to report the alleged offenses "near the end of 2008." Indictments against Defendant were filed on 12 January 2009, with superseding indictments filed on 14 November 2011. At the time of Defendant's trial, E.C. was twenty-nine years old, and J.C. was twenty-seven years old.

Defendant was convicted on 17 February 2012 of one count of first-degree sex offense, three counts of first-degree rape, and five counts of taking indecent liberties with a child. Defendant appealed, and this Court reversed and remanded for a new trial in part, and found no error in part. *State v. Walston*, __ N.C. App. __, 747 S.E.2d 720 (2013) ("*Walston I*").

1. Though E.C. and J.C. were adults at the time of the trial, because the alleged crimes and most of the relevant events occurred when E.C. and J.C. were children, and for ease of understanding, in this opinion we shall refer to them collectively as "the children" even when we are discussing events that occurred after they reached adulthood.

In *Walston I*, we also determined that the trial court, in making its determination whether to admit certain expert testimony, had applied a version of N.C. Gen. Stat. § 8C-1, Rule 702 that had been superseded by amendment. *Walston I*, __ N.C. App. at __, 747 S.E.2d at 728. Although this issue was not argued by Defendant on appeal, we instructed the trial court to apply the amended version of Rule 702 upon remand should it again need to rule on the admissibility of expert testimony. *Id.*

The State petitioned our Supreme Court for discretionary review and review was granted, but only on the issues for which this Court had granted Defendant a new trial. The Supreme Court reversed the portions of *Walston I* wherein this Court granted Defendant a new trial, and remanded for this Court to address one specific issue. *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) ("*Walston II*"). In *Walston II*, our Supreme Court directed: "On remand the Court of Appeals should address fully whether the trial court's application of the former expert witness standard [Rule 702] was prejudicial error." *Id.*

Defendant filed a motion on 5 January 2015 to withdraw our Supreme Court's opinion in *Walston II*, arguing that the *Walston II* opinion "fail[ed] to address properly presented issues, [was] based on an incomplete review of the record and interpret[ed] the Rules of Evidence so as to violate the Constitution." Our Supreme Court denied Defendant's motion to withdraw *Walston II* and this Court conducted the review directed by our Supreme Court. We determined, by opinion filed 17 February 2015, that Defendant had not been prejudiced by the application of the former expert witness standard. *State v. Walston*, __ N.C. App. __, __ S.E.2d __, 2015 WL 680240 (Feb. 17, 2015) ("*Walston III*").

Defendant petitioned our Supreme Court for discretionary review on 23 March 2015, arguing:

> This Court granted the State's Petition for Discretionary Review of the two issues the Court of Appeals granted relief on. It reversed the Court of Appeals on both issues. It denied [D]efendant's Petition for Discretionary Review of the defense expert testimony issue. It remanded the case to the Court of Appeals to address an issue never raised at trial: whether the trial judge employed the "old" Rule 702 or the amended one. The lower court held that, because the judge excluded the evidence under the old, more lenient rule, he would have excluded it under the new, more stringent one.

> The issue not reached by the Court of Appeals was the one raised at trial: *whether an expert who has not examined the complaining witness is excludable as a witness on that basis.* Neither appellate court has addressed that issue.
>
> The opinion of the Court of Appeals is also flawed in that it found no error because the trial court would have excluded the proffered evidence under either version of Rule 702. However the issue on appeal is not what the trial court would have done but whether it committed error. The opinion of the Court of Appeals does not address, much less explain, why it was not error for the trial court to exclude [D]efendant's evidence. [Emphasis added, footnote omitted].

In its response to Defendant's 23 March 2015 petition, the State noted that the issue of the trial court's exclusion of Defendant's expert witness was not one included in the State's 9 September 2013 petition for discretionary review in response to *Walston I*, and that our Supreme Court denied Defendant's 23 September 2013 conditional petition for discretionary review seeking review of that issue. The State further argued that Defendant had not articulated any proper basis for discretionary review as mandated by N.C. Gen. Stat. § 7A-31(c) and that, because this Court answered the question it was directed by our Supreme Court to answer, there was no error.

By order entered 24 September 2015, our Supreme Court declined to address the merits of Defendant's petition itself and ruled:

> [D]efendant's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals to (1) determine, in light of our holding and analysis in *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012) (applying North Carolina Rules of Evidence 403 and 702), and other relevant authority, if the trial court's decision to exclude the expert testimony was an abuse of discretion and, if so, (2) determine if the erroneous decision to exclude the testimony prejudiced [D]efendant.

In response to our Supreme Court's 28 September 2015 order, this Court vacated the certification of *Walston III*. We now address our Supreme Court's new mandate.

I.

[1] Relevant to the issue currently before us, Defendant argues that the trial court, based on the erroneous belief that the excluded testimony was not admissible as a matter of law, improperly excluded Defendant's testimony of his expert witness, Dr. Moira Artigues ("Dr. Artigues"), who would have given expert testimony concerning the suggestibility of children. We agree.

" '[O]rdinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge.' However, where an appeal presents questions of statutory interpretation, full review is appropriate, and a trial court's conclusions of law are reviewable *de novo*." *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (citations omitted); *see also Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008). Defendant argues that the trial court erroneously concluded that this Court's opinion in *State v. Robertson*, 115 N.C. App. 249, 444 S.E.2d 643 (1994), held that Dr. Artigues' testimony was inadmissible pursuant to Rule 702 as a matter of law because Dr. Artigues had not personally interviewed the children. Unfortunately, in the present case the trial court made no findings of fact or conclusions of law; it simply ruled that Dr. Artigues would not be allowed to testify, so we have no conclusions of law to review.

In the present case, Defendant attempted to show that statements made by the children showed that there was a period of years following the alleged abuse when the children had no recollection of that alleged abuse. For instance, in an email to a family friend with counseling experience, E.C. stated that she had blocked out all memory of the alleged abuse for years:

> [DEFENSE COUNSEL:] [Reading from E.C.'s email:] Third paragraph [from email exchange]. Have you ever had this incident blocked out? Yes. I don't remember when it was blocked out or exactly what I remember-- or when I remembered it but I know it came back to me in eighth grade. With the block I forgot many other childhood memories from this time. I have no other memories of [Defendant] either.
>
> [DEFENSE COUNSEL:] And was that true what you wrote there . . . ?
>
> [E.C.:] At the time I wrote it, it was true.

Concerning J.C., clinical records from a September 2001 session J.C. had at Albemarle Mental Health Center stated: "[J.C.] then reveal[ed] the fact that she was raped at age five and she did not remember this until she was in the seventh grade." J.C. testified regarding statements she had given to an investigator, as follows:

> [DEFENSE COUNSEL:] Do you recall telling [the investigator] during that first interview that you were sitting in science class and that you were learning how to use the microscope and that's what you believe started the memories was seeing a boy moving his legs in a chair in the way that [Defendant] used to do, is that what you told her?
>
> [J.C.:] Yes.
>
> [DEFENSE COUNSEL:] And how [long] had those memories been gone from your consciousness?
>
> [J.C.:] I knew-- I don't know exactly how long.

J.C. argued at trial that she had not actually blocked out memories of the alleged abuse, but had simply decided not to think about it. E.C. admitted that she had probably completely forgotten about the alleged abuse for up to two years. In any event, the question of whether the children had "lost" all memory of the alleged abuse for some period of time was, at a minimum, a contested issue at trial.

Prior to trial, the State filed a motion to suppress Dr. Artigues' testimony, arguing:

> 5. Due to the late disclosure, it is impossible for the State to secure an expert witness in less than 5 working days to rebut the defense's expert witness. Thus, the State request[s] the Court, pursuant to NCGS § 15A-910, to prohibit the defense from introducing said expert testimony.
>
> 6. In the alternative, the State requests the Court to conduct a voir dir[e] hearing as to the admissibility of said expert testimony.
>
> a. The State contends that the proposed expert testimony is not relevant or admissible pursuant to Rule 703 and 403 as this is not a case involving "repressed" or "recovered" memories.
>
> b. In addition, the State contends the *expert is not qualified pursuant to Rule 702 to testify as to "false*

> *memories being suggested, implanted or evoked," specifically since the proposed expert witness has never examined or evaluated the two alleged victims.* Further, the probative value of the testimony is substantially outweighed by its potential to prejudice or confuse the jury pursuant to Rule 403. [Emphasis added.]

At the motions hearing, the trial court did not rule on the State's argument to exclude Dr. Artigues' testimony as a sanction pursuant to N.C. Gen. Stat. § 15A-910. The State then moved the trial court to exclude Dr. Artigues' testimony because the State contended this was not a "repressed memory case," based upon this Court's opinion in *Robertson*. The State contended *Robertson* mandated the exclusion of the testimony because Dr. Artigues had not personally examined either of the alleged victims. The following colloquy occurred between the trial court and the attorneys for Defendant and the State:

> [DEFENSE COUNSEL:] [Dr. Artigues was retained to] testify regarding the theory about repressed memory being generally unaccepted. And we think given the fact that it is a repressed memory case it will be reversible error to not allow us to attack that.
>
> THE COURT: What if I think it's not a repressed memory, then I shouldn't let the psychiatrist testify?
>
> [DEFENSE COUNSEL:] We have two areas. Obviously, Your Honor, if you think this has nothing to do with repressed memory then Your Honor may feel that any anti-repressed memory testimony will be no more relevant than any expert testimony in support of repressed memory. But we do have, have retained her for two issues, and *the other issue is to testify about the suggestibility of memory and how being repeatedly told you were abused, especially telling a small child that over, many, many over a decade, telling somebody that can lead [to false memories.]* [Emphasis added.]
>
> THE COURT: Why can't the psychiatrist testify to that?
>
> . . . .
>
> [THE STATE:] Your Honor, I do have a case – sounds like that Your Honor has ruled with respect to this expert can't testify to recovered or repressed memories. So then our second basis is about susceptibility. I would like to hand

> up two cases, Your Honor, one of them that is specifically on point, State versus Robertson, which is a Court of Appeals case, 115 N.C. App. 249.
>
> . . . .
>
> [THE STATE:] And what happened in [the *Robertson*] case, Your Honor, is that the defense had an expert on suggestibility, that the victim's memories have been created or altered or suggested to them in some way. And the Court said no, this expert can't testify for several reasons. One of them is just that the probative value was not outweighed by the prejudicial effect. But most importantly the reason the Judge found this is because the expert never talked to the victims, examined the victims in any way, shape or form, which is just like this case.

The State further argued: "[T]he Robertson Court . . . specifically said that . . . the trial court did not err . . . by excluding the testimony of the defense expert psychologist on suggestibility of the child witness where the witness had never been examined or evaluated" by the defense expert.

In the case before us, the trial court then requested of Defendant's counsel: "Let's get to the issue where your witness can testify in light of fact that she . . . never interviewed or spoke with the victim in this case." Defense counsel argued to the trial court that there was evidence indicating the children's mother and "grandmother"[2] had pressured the children in the years following the alleged incidents to admit they had been molested by Defendant. Defendant's counsel stated that he believed, in light of the evidence and the possibility that suggestions from the mother and "grandmother" could have resulted in false "memories" of sexual assault, that Dr. Artigues should be allowed to testify concerning general issues of the susceptibility of children. The trial court then asked Defendant: "Did [Dr. Artigues] talk to anybody else involved in the case other than you? . . . . Had she talked with anyone else?" Defendant's counsel answered that, to his knowledge, Dr. Artigues had not personally interviewed the children or anyone else involved. The trial court then ruled that it was "going to deny the testimony of the expert psychologist."

At the motions hearing, the trial court ruled – based only upon the State's arguments, and defense counsel's proffer of what Dr. Artigues'

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2. The children considered this person to be their grandmother though she was not a blood relation

testimony would be – that Defendant could not call Dr. Artigues to testify. The trial court did not articulate the basis for its decision. Later, following the close of the State's evidence at trial, a *voir dire* was conducted to preserve Dr. Artigues' excluded opinion testimony for appellate review. During this *voir dire*, the trial court cut short testimony concerning Dr. Artigues' qualifications, stating: "I'm sure she's an expert in the field she's purported to be an expert in. Let's get to the issue at hand."

Following *voir dire*, Defendant moved for the trial court to reconsider its ruling and admit the testimony, stating "for the purposes of the record and for no other reason, we'd ask the Court to reconsider its ruling[.]" The State argued: "As it applies to the suggestibility, I remind Your Honor the Embler [case],[3] which specifically says that this type of expert testimony does not come in when the expert has not evaluated the victim but Your Honor obviously heard that didn't take place in this case." The trial court then stated: "I'm not inclined to change my ruling that this evidence should not come before the jury."

From the State's motion to suppress and the discussions at trial, it is apparent that the trial court excluded Dr. Artigues' testimony for two reasons. First, the trial court seemed to have decided that this case was not a "repressed memory" case and, therefore, testimony concerning the reliability of recovered memories was not relevant. The trial court asked Defendant's counsel at the hearing: "What if I think it's not a repressed memory, then I shouldn't let the psychiatrist testify?" Defendant and the State understood this comment to mean the trial court was prohibiting "repressed memory" testimony for that reason. Second, the trial court seemed to agree with the State's argument that the trial court could not allow an expert witness to testify in that situation, even about the general susceptibility of children to suggestion, if that expert had not interviewed the alleged victims. The State provided the trial court with *Robertson* in support of this proposition,[4]

In *Robertson*, our Court reasoned concerning the defendant's proposed expert witness:

> Dr. Warren was certified by the trial court as an expert in clinical psychology and human behavior. Defendant

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3. Though it is not clear from the record, it appears the State was referring to *State v. Embler*, 213 N.C. App. 218, 714 S.E.2d 209 (2011) (unpublished opinion).

4. The State also appears to have argued *Embler*, 213 N.C. App. 218, 714 S.E.2d 209, in support of its position. However, we do not find the holdings in *Embler* relevant to the issues before us. In addition, *Embler* is an unpublished opinion and therefore not binding.

> offered Dr. Warren's testimony on the phenomenon of suggestibility. On *voir dire*, Dr. Warren testified that suggestibility is the "altering or the creation of memories through questions, gestures, other stimuli that happen around the person who is doing the remembering." Dr. Warren would have also testified that suggestibility is significant in young children or intellectually impaired persons. Defendant offered Dr. Warren's testimony to show that the victim's memory may have been created or altered through suggestion.
>
> . . . .
>
> Here, Dr. Warren testified that he did not ever examine or evaluate the victim or anyone else connected with this case. *On these facts*, the trial court *could* properly conclude that the probative value of Dr. Warren's testimony was outweighed by its potential to prejudice or confuse the jury. Similarly, we are not persuaded that Dr. Warren's testimony would have "appreciably aided" the jury since he had never examined or evaluated the victim. Accordingly, we conclude that the trial court did not abuse its discretion in excluding Dr. Warren's testimony.

Robertson, 115 N.C. App. at 260-61, 444 S.E.2d at 649 (emphasis added). This Court in *Robertson* neither created nor recognized a *per se* rule that expert opinion concerning the general suggestibility of children may only be given at trial if the testifying expert has examined the child or children in question. This Court simply held that the trial court had not abused its discretion by excluding the proposed expert testimony pursuant to Rule 403 of the North Carolina Rules of Evidence. Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 of the North Carolina Rules of Evidence are met. As with any proposed expert opinion, the trial court shall use its discretion, guided by Rule 702 and Rule 403, to determine whether the testimony should be allowed in light of the facts before it. This Court in *Robertson* merely agreed that the trial court had not abused its discretion based upon the facts of that case. *Id.*

As our Supreme Court has stated, expert opinion testimony is useful in assisting the trier of fact in understanding concepts not generally understood by laypersons, *including* when those concepts are relevant in assessing the credibility of alleged child victims of sexual abuse:

> Where scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702, and the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703. The testimony of . . . [expert] witnesses, if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim.

State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

Further, this Court has held that generalized expert opinion concerning the reliability of child witnesses is permissible. *See In re Lucas*, 94 N.C. App. 442, 450, 380 S.E.2d 563, 568 (1989) (doctor's opinion "related to the general credibility of children, not credibility of the child in question" who reported sexual abuse was admissible and his "testimony was more probative than prejudicial under Rule 403"); *State v. Oliver*, 85 N.C. App. 1, 12, 354 S.E.2d 527, 534 (1987) (a pediatrician is in "a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse"); *State v. Jenkins*, 83 N.C. App. 616, 624, 351 S.E.2d 299, 304 (1986). In discussing the admissibility of an expert witness' opinion, this Court has reasoned:

> [U]ntil now, our courts have not been presented with the question of admissibility of expert testimony on the credibility of children in general who relate stories of sexual abuse.
>
> Dr. Scott testified that children don't make up stories about sexual abuse and that the younger the child, the more believable the story.[5] He did not testify to the credibility of *the victim* but to the general credibility of children who report sexual abuse. Since such testimony was Dr. Scott's interpretation of facts within his expertise, and not his opinion upon the credibility of the specific victim, it is not excluded by Rule 405. The proper test of its admissibility is whether he was in a better position to have an

5. Current science seems to have shifted to a position that young children are *more* susceptible to adopting misleading suggestions. *See, e.g.*, Maggie Bruck and Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 Ann. Rev. Psychol. 419-39 (1999); *see also United States v. Rouse*, 100 F.3d 560, 569-71 (8th Cir. 1996), *reh'g en banc granted, judgment vacated*, 107 F.3d 557 (8th Cir. 1997).

opinion than the jury. In other words, was Dr. Scott's opinion helpful to the jury? We determine that it was.

The nature of the sexual abuse of children . . . places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury determine the credibility of a child who complains of sexual abuse. The young child . . . subjected to sexual abuse may be unaware or uncertain of the criminality of the abuser's conduct. Thus, the child may delay reporting the abuse. In addition, the child may delay reporting the abuse because of confusion, guilt, fear or shame. The victim may also recant the story or, particularly because of youth . . ., be unable to remember the chronology of the abuse or be unable to relate it consistently.

Dr. Scott is a pediatrician. He testified he had been a member of the Child Medical Examiners Program for child abuse from its beginning in the early 1970's and since that time had interviewed approximately one to two children each month who had allegedly been sexually abused. Dr. Scott testified he had devoted a portion of his practice to the examination of children involved in sexual abuse and that he had kept abreast of information in that area through professional journals. We find that Dr. Scott was in a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse. His opinion is therefore admissible under Rule 702.

. . . .

Dr. Scott's opinion was helpful to the jury in determining the victim's credibility and was therefore probative.

The jury had the opportunity to see and hear the prosecuting witness both upon direct and cross-examination. The defendants had ample opportunity to discount Dr. Scott's testimony both by cross-examination and presentation of their own expert witness had they chosen to do so. We find the trial court did not abuse its discretion by admitting the testimony under Rule 403.

As the testimony was admissible under Rule 702 and Rule 403, we find the trial court did not err in allowing Dr. Scott

> to testify on the credibility of children in general who report sexual abuse.

Oliver, 85 N.C. App. at 11-13, 354 S.E.2d at 533-34. This reasoning applies equally to both defendant's and the State's experts. As this Court, citing the United States Supreme Court, has noted:

> Accuracy in criminal proceedings is a particularly compelling public policy concern:
>
> > The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.
>
> *Ake v. Oklahoma*, 470 U.S. 68, 78, 84 L. Ed. 2d 53, 63 (1985). The United States Supreme Court has stated that a defendant on trial has a greater interest in presenting expert testimony in his favor than the State has in preventing such testimony:
>
> > The State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. . . . .
>
> *Ake*, 470 U.S. at 79, 84 L.Ed.2d at 63–64.

State v. Cooper, __ N.C. App. __, __, 747 S.E.2d 398, 404 (2013), *disc. review denied*, 367 N.C. 290, 753 S.E.2d 783 (2014).

> "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Cooper, __ N.C. App.at __, 747 S.E.2d at 406 (citing *Taylor v. Illinois*, 484 U.S. 400, 408–09, 98 L. Ed. 2d 798, 810 (1988) (citations omitted)).

It is true that the expert witness in *Oliver* had, as an expert called by the State, interviewed or examined the alleged victim. However, defendants will rarely have access to prosecuting witnesses in order for their experts to personally examine or interview those witnesses. *State v. Fletcher*, 322 N.C. 415, 419, 368 S.E.2d 633, 635 (1988). Defendant's expert in this case had no right to access the prosecuting witnesses absent their consent. The ability of a defendant to present expert witness testimony on his behalf cannot be subject to the agreement of the prosecuting witness, for that agreement will rarely materialize.

This Court has previously suggested that examination of an alleged child victim of sexual assault is not required for an expert to testify concerning the child's likely sexual behavior, and the behavior of children in general. *State v. Jones*, 147 N.C. App. 527, 541-43, 556 S.E.2d 644, 654 (2001), *questioned on other grounds by In re M.L.T.H.*, 200 N.C. App. 476, 685 S.E.2d 117 (2009); *see also State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith"). In *Jones*, the testifying expert, Dr. Cooper, in forming her opinion, could only rely on "the [deceased] victim's medical records, the police investigation reports, the autopsy report from the State Chief Medical Examiner, Dr. John Butts, and autopsy photographs. Dr. Cooper also testified that she had taken a personal history from the victim's grandmother 'for the purpose of obtaining more medical information.' " *Jones*, 147 N.C. App. at 541-42, 556 S.E.2d at 653. Based upon those records, Dr. Cooper, the expert in *Jones* testified

> that the description of [the victim] having seduced, uh, a youth offender is extremely out of character. You do not have a child who has given any indication that she is sexually promiscuous or that she is precocious in any way as far as her sexual being is concerned. . . . . This is very out of char – would be – have been very out of character for a child who has all of the other behaviors and symptoms that we see in this child who carries dolls in her little backpack and who plays with dolls in the evenings and who has sleepovers with children three and four years younger than she is. That would be extremely out of character.

Jones, 147 N.C. App. at 543, 556 S.E.2d at 654. Dr. Cooper, the expert in *Jones*, was allowed to testify that, based upon medical records and

background information obtained from the victim's grandmother, she believed it was unlikely that the victim would have acted out in a sexual nature towards the defendant. *Id.* In the case before us, Dr. Artigues had background information from statements made by the children, their mother, and their "grandmother," concerning the children's memories related to the alleged event, and the behavior of their mother, "grandmother," and themselves with regard to the allegations that Defendant had abused the children. This information was contained in records from the Department of Social Services and Sheriff's Department related to the 1994 investigation of Defendant for those alleged acts, counselor's notes taken in the course of assessing J.C., police reports of interviews with the children and other witnesses, and emails between the children and a family friend with some counseling experience.

In addition, the interviews with the alleged victims in *Oliver* and *Jenkins*, which could have informed the experts' opinions concerning the credibility of the prosecuting witnesses in those cases, could only minimally inform their opinions concerning the credibility of children *in general*. General opinions related to credibility and suggestibility are informed by ongoing practice and research, not based upon interviews with a particular alleged victim of sexual assault. If expert testimony concerning general traits, behaviors, or phenomena can be helpful to the trier of fact — and it satisfies the requirements of Rule 702 and Rule 403 — it is admissible. This is true whether or not the expert has had the opportunity to personally interview the prosecuting witness.

Of course, expressing an opinion concerning the *truthfulness* of a prosecuting witness is generally forbidden. *Oliver*, 85 N.C. App. at 10, 354 S.E.2d at 533; *Jenkins*, 83 N.C. App. at 624-25, 351 S.E.2d at 304. However, expert opinion relating to the behavior of an alleged victim, in order to assist the trier of fact in assessing credibility, is permitted. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366 ("[M]ental and emotional state of the victim before, during, and after the offenses as well as her intelligence, although not elements of the crime, are relevant factors to be considered by the jury in arriving at its verdicts. Any expert testimony serving to enlighten the jury as to these factors is admissible under Rule 702 of the North Carolina Rules of Evidence." And, the "testimony of both of these [expert] witnesses, if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim."); *Jones*, 147 N.C. App. at 543, 556 S.E.2d at 654. It is not required that the expert conduct an interview with the alleged victim for this kind of testimony to be admitted.

In the present case, Defendant's argument at trial was not that the children were lying, but that their alleged memories of abuse were in reality the result of repeated suggestions from their mother and "grandmother" that Defendant had abused them. In support of this argument, Defendant contended that the evidence before the trial court was more consistent with false memories implanted through suggestion than with recovered memories that had been repressed. Dr. Artigues' proffered testimony was directly relevant to this defense, whether or not the State was classifying the case as one involving repressed memories. Dr. Artigues' testimony would have also supported the idea that the children's alleged memories had been the result of repeated suggestion even if the jury believed the children never "forgot" that they had allegedly been abused by Defendant.

Dr. Artigues testified on *voir dire*: "In my opinion there were a lot of references in the discovery to repressed memory[.]" Dr. Artigues based her opinion on statements made by the children in their emails; written statements of friends and family; and police and medical reports. Dr. Artigues testified as follows concerning the circumstances surrounding how E.C. and J.C. appeared to have forgotten, then remembered, the alleged events: "Appears to me this is very consistent with [the concept of] repressed memory. There are numerous references to this being a memory that was not in [conscious] awareness until a given point in time." E.C. agreed in her testimony that she must have lost memory of the alleged abuse for approximately two years. Whether J.C. had ever "forgotten" about the alleged abuse was a contested issue at trial. There was evidence, both forecast before trial and brought out at trial, supporting Defendant's and Dr. Artigues' opinions that the events leading up to the charges against Defendant were consistent with facts alleged in recovered memory cases.

Dr. Artigues testified regarding her opinion concerning the validity of "repressed memory" as a psychological phenomenon:

> Repressed memory is an idea that goes back to Sigmund Freud. Freud was treating a lot of women that he diagnosed with hysteria and many of them talked in great detail about memories of being sexually abused and after years and years of this Freud began to think maybe these memories had been repressed and came back later. But even at the end of his career, Freud himself said he couldn't support the idea of repression anymore. Then it started being studied, gosh, it's been studied for 60 years. Researchers try to get people to repress memory unsuccessfully. It has

> essentially been defunct in the scientific community or is not considered scientifically valid. There is no empirical data to support it. In fact, all of the research, vast majority says that you can create memory that is not true in people. It's been done hundreds and hundreds of times. You can implant memories, you can influence memories through suggestion. They have done this with research subjects over and over again. The American Psychological Association has taken a stand saying that they don't put stock in repressed memories because of the lack of scientific data to support that. So in general, there is no data to support repressed memories and it's not accepted in the scientific community.

Dr. Artigues further testified on *voir dire* concerning her opinion regarding why the children may have believed they remembered being sexually assaulted by Defendant after periods of time in which they seemed to have forgotten these alleged incidents:

> [DR. ARTIGUES:] [W]hat influenced my opinion about that was seeing that [their mother] had grilled[6] the children, that she had told them, I will be here for you if you ever – or if you're ready to disclose this, that shortly after that they were shown a good touch, bad touch video, that the[ir] grandmother figure . . . had cussed [J.C.] out for not disclosing, which applies a lot of emotional pressure to a child. That in 1994 DSS did an investigation in which both girls were interviewed by law enforcement. Again, we have these children being sexualized, is what we call it in therapist lingo, meaning they are given an identity around this claim that they have somehow been sexually abused or sexually harmed, which may not be true. But this is such a powerful influence and it keeps happening in their lives that they begin to take it on as true. It was also noted in [another witness'] statement that [their mother] talked about it frequently, that she'd talked about it over the years. There was a mention in the discovery that [their mother] had mentioned it at the post office to others. That

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6. E.C. reportedly told an investigator in 1994 that her mother and grandmother were "grilling" her and trying to get E.C. to admit that Defendant had molested her. During the 1994 investigation, E.C. denied any inappropriate contact with Defendant had ever occurred.

> [their mother] said, I knew it as soon as the girls made this disclosure. So it looked to me as though there were many things that happened that could have influenced memory and many ways in which emotional pressure was applied to these very young children that could result in the production of memories that are not true.
>
> . . . .
>
> [Researchers] can get [people] to believe that they were lost in a mall, get them to believe that many things happened to them in childhood through suggestion that simply were not true. The other thing the research showed was that over time the subjects become more confident in their stories and the stories become more detailed. So even in the research setting they would interview the research subject the first time and they would give the outline of memory that [had] been implanted. But then later the research subject interviewed the second time would provide more details. So what this illustrates is that memory is not a tape recorder in our brain. There's not a location in the brain for memory. Memory is stored all throughout our brain and thus cannot help but be influenced by other things. Memory is actually a recent production of a lot of things that are going on in our brain and highly suggestible to influence. One other thing I would mention is this has also been studied extensively in terms of eyewitness testimony, how they can be influenced. There have been many, many studies about memory and showing how memory reliability can be pretty shaky.
>
> [DEFENSE COUNSEL:] Did you find, in reviewing the discovery, that the stories, the description that each of the . . . girls gave regarding incident became more detailed, appeared to become more elaborate each time?
>
> [DR. ARTIGUES:] Yes, it did.
>
> [DEFENSE COUNSEL:] In your opinion, would this be consistent with a memory that has been suggested or invoked by some outside influences?
>
> [DR. ARTIGUES:] It is consistent with that, yes.

The State's cross-examination of Dr. Artigues focused on the fact that she had not personally interviewed the children and, therefore,

could not know the context of the children's comments regarding the nature of their memories. Following *voir dire*, Defendant moved: "For the purposes of the record and for no other reason, we'd ask the Court to reconsider its ruling[.]" The State again argued that the case was not a "repressed memory" case and that the trial court could not legally allow Dr. Artigues to testify about the susceptibility of the children, or children in general, to implanted memories because Dr. Artigues had "not evaluated the victim[s.]" The trial court stated that it would not change its ruling, which appears to have been based upon its erroneous belief that, as a matter of law, it could not allow Dr. Artigues' expert testimony because she had never examined the children.

In the absence of any findings of fact or conclusions of law explaining the rationale of the trial court in making its ruling excluding Dr. Artigues' testimony, and in light of the discussions at trial, we find that the trial court improperly excluded Dr. Artigues' testimony based upon the erroneous belief that her testimony was inadmissible as a matter of law. As discussed above, it was not required that Dr. Artigues personally examine the children in order to testify as she did in *voir dire*. Because the trial court excluded Dr. Artigues' testimony based upon an erroneous understanding of law, we reverse Defendant's conviction and remand for a new trial. Should Defendant seek to introduce similar expert testimony, the trial court shall make its ruling based on our analysis above, and further consider additional factors discussed below.

II.

[2] We now address the mandate of our Supreme Court to review the ruling of the trial court in light of *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012) ("*King II*"). Our Supreme Court's opinion in *King II* was not argued in Defendant's original brief or in his petition for discretionary review, and this Court has received no direction from our Supreme Court beyond that included in its 24 September 2015 order. Defendant's sole argument on appeal was that "[t]here is nothing in *Howerton* [*v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004)] or [Rule 702] to suggest that a witness must have personally interviewed the person(s) about whom she will testify. Indeed, this Court has approved of expert testimony from such witnesses testifying for the prosecution." Defendant's discussion of Rule 702 in his brief is limited to his argument that nothing in Rule 702 prohibited Dr. Artigues' testimony simply because she had not interviewed the children. Defendant does not argue that the trial court erred by failing to find Dr. Artigues was an expert in the relevant field. The trial court seemed to have made a determination that Dr. Artigues was, in fact, an expert. The trial court did not make

any specific findings or conclusions related to Rule 702. We have found that the trial court relied on the State's argument that Dr. Artigues could not give expert opinion testimony because she had not personally interviewed the children. As we have held above, Dr. Artigues' testimony was not inadmissible simply because she had not interviewed the children.

With these facts in mind, we attempt to determine how *King II* is relevant to our analysis. One of the holdings in *King II* "disavow[ed] the portion of the [Court of Appeals] opinion . . . requir[ing] expert testimony always to accompany the testimony of a lay witness in cases involving allegedly recovered memories." *King II*, 366 N.C. at 68-69, 733 S.E.2d at 536. Defendant did argue at trial that the State should not allow the alleged victim's testimony, which Defendant contended amounted to recovered memories, without also providing expert testimony. Defendant relied on the Court of Appeals' opinion in *State v. King*, 214 N.C. App. 114, 713 S.E.2d 772 (2011) ("*King I*"), as well as *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997),[7] in support of this argument. However, our Supreme Court's holding in *King II* makes clear that expert testimony is not always required. *King II*, 366 N.C. at 78, 733 S.E.2d at 542. Defendant is not arguing on appeal that the testimony of the children should have been excluded because there was no expert testimony presented at trial explaining repressed memory; rather, Defendant is arguing that his expert's testimony should have been allowed. We do not believe this holding in *King II* is relevant to the issue before us.

Our Supreme Court in *King II* affirmed this Court's prior holding that the trial court had *not* abused its discretion by *granting* the defendant's motion to suppress "expert testimony regarding repressed memory" by the *State's* witness. *Id.* at 68, 733 S.E.2d at 536. Our Supreme Court based this holding in part on its findings that

> the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the scientific community did not by itself prevent admission of evidence

7. Abrogated by *King II*, 366 N.C. at 78, 733 S.E.2d at 542.

regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been "technically met" and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The court further found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.

We conclude that the trial court did not abuse its discretion by granting defendant's motion to suppress after applying Rule 702, *Howerton*, and Rule 403. The test of relevance for expert testimony is no different from the test applied to all other evidence. Relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C–1, Rule 401 (2011). We agree with the trial court that the expert evidence presented was relevant. Nevertheless, like all other relevant evidence, expert testimony must satisfy the requirements of Rule 403 to be admissible. Although the dissenting judge in the Court of Appeals accurately pointed out that *Howerton* envisions admission of expert testimony on controversial theories, he also correctly noted that "not . . . all 403 safeguards are removed" when the *Howerton* factors apply. If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial effect and the probative value of the evidence in that case. Battles of the experts will still be possible in such cases. However, when a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence. The trial judge here assiduously sifted through expert testimony that lasted two days,

> thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

King II, 366 N.C. at 76-77, 733 S.E.2d at 540-41. Initially, we note that in *King II* the trial court ruled the State's expert testimony was admissible pursuant to Rule 702, but excluded the testimony pursuant to Rule 403. The State only appealed the trial court's ruling pursuant to Rule 403, as the Rule 702 ruling was in the State's favor. Therefore, the Rule 702 analysis in *King I* and *King II* was not necessary to the outcome of either opinion.

Further, *King II* involved application of the earlier version of Rule 702. In its Rule 702 analysis, our Supreme Court in *King II* was applying the factors set out in *Howerton*. *State v. King II*, 366 N.C. at 75, 733 S.E.2d at 540 ("The test to determine whether proposed expert testimony is admissible was set out in *Howerton*, in which this Court rejected the federal standard for admission of expert testimony established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693. *Howerton* approved the three-part test for determining admissibility of expert testimony described in *State v. Goode*. *Id.* at 458, 469, 597 S.E.2d at 686, 692 (citing *Goode*, 341 N.C. at 527–29, 461 S.E.2d at 639–41).").

As this Court has noted:

> Rule 702 was amended effective 1 October 2011. See 2011 N.C. Sess. Laws 283 § 1.3. While our Supreme Court has not yet addressed the amendment to Rule 702, our Court of Appeals has done so and recently noted that "[o]ur Rule 702 was amended to mirror the Federal Rule 702, which itself ' "was amended to conform to the standard outlined in *Daubert [v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993)]." ' " *Pope v. Bridge Broom, Inc.*, __ N.C. App. __, 770 S.E.2d 702, 707 (2015) (citing *State v. McGrady*, __ N.C. App. __, __, 753 S.E.2d 361, 365 (quoting Committee Counsel Bill Patterson, 2011–2012 General Assembly, House Bill 542: Tort Reform for Citizens and Business 2–3 n. 3 (8 June 2011)), *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014)).

State v. Turbyfill, __ N.C. App. __, __, 776 S.E.2d 249, 253 (2015). Rule 702 states, in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C–1, Rule 702(a) (2013). Subsections (1) (2) and (3) were added by the 2011 amendment, effective 1 October 2011. The trial court was not considering these factors, however, as it was operating under the assumption that the prior version of Rule 702 applied. Further, there is no evidence the trial court even considered the *Howerton* factors, most likely because of its erroneous belief that *Robertson* mandated that Dr. Artigues' testimony be excluded. Regarding the current version of Rule 702, this Court has held:

> Consistent with the application of Federal Rule 702 in federal courts, under North Carolina's amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:
>
> Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Third, the testimony must be reliable. *Id.*

Turbyfill, __ N.C. App. at __, 776 S.E.2d at 254; *see also Daubert*, 509 U.S. at 594-95, 125 L. Ed. 2d at 484 (1993) ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the

principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

We discern several parts of the analysis in *King II* that are potentially relevant to the issues raised at trial, even if not issues directly before us on appeal. First, because scientific understanding of any particular issue is constantly advancing and evolving, courts should evaluate the specific scientific evidence presented at trial and not rigidly adhere to prior decisions regarding similar evidence with the obvious exception of evidence — results of polygraph tests, for example — that has been specifically held inadmissible. *King II*, 366 N.C. at 77, 733 S.E.2d at 541 ("[W]e stress that we are reviewing the evidence presented and the order entered in this case only. We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is 'rapid and fluid.' "). Second, even evidence of disputed scientific validity will be admissible pursuant to Rule 702 so long as the requirements of Rule 702 are met. In *King II*, the trial court expressed great concern over the validity of alleged repressed and recovered memories but ruled that the proposed expert testimony regarding repressed memories satisfied the requirements of the *Howerton* analysis then required by Rule 702. *King II*, 366 N.C. at 72-73, 733 S.E.2d at 538. Our Supreme Court agreed with the decision of the trial court. *King II*, 366 N.C. at 76, 733 S.E.2d at 540-41. We note, however, that the trial court in *King II* was applying the less stringent *Howerton* test associated with the prior version of Rule 702. It is uncertain whether our Supreme Court would come to the same conclusion when applying the current version of Rule 702. Third, the reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion. Concerning the trial court's ruling in *King II*, our Supreme Court stated:

> As detailed above, the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the

> scientific community did not by itself prevent admission of evidence regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been "technically met" and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The court further found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.
>
> . . . .
>
> The trial judge here assiduously sifted through expert testimony that lasted two days, thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

King II, 366 N.C. at 76-77, 733 S.E.2d at 540-41; *see also id.* at 71, 733 S.E.2d at 538 ("After hearing arguments from the State and from defendant, the trial court granted defendant's motion to suppress in an extensive oral order issued from the bench on 13 April 2010. On 23 April 2010, the trial court entered a written order making findings of fact and conclusions of law."). Finally, the trial court is granted broad discretion in deciding whether to admit expert testimony:

> A leading treatise on evidence in North Carolina acknowledges that "there can be expert testimony upon practically any facet of human knowledge and experience." When making preliminary determinations on the admissibility of expert testimony, "trial courts are not bound by the rules of evidence." In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of

> discretion. Trial courts enjoy "wide latitude and discretion when making a determination about the admissibility of [expert] testimony." A trial court's admission of expert testimony " 'will not be reversed on appeal unless there is no evidence to support it.' " Thus, " 'the trial court is afforded wide discretion' in determining the admissibility of expert testimony and 'will be reversed only for an abuse of that discretion.' "

King II, 366 N.C. at 74-75, 733 S.E.2d at 539-40 (citations omitted).

In the present case, the trial court ruled – based only upon the State's arguments and defense counsel's proffer of what Dr. Artigues' testimony would be – that Defendant could not call Dr. Artigues to testify. The trial court did not articulate the basis for its decision. Later, during the trial, a *voir dire* was conducted to preserve Dr. Artigues' excluded opinion testimony for appellate review. During this *voir dire*, the trial court cut short testimony concerning Dr. Artigues' qualifications, stating: "I'm sure she's an expert in the field she's purported to be an expert in. Let's just get to the issue at hand." Following *voir dire*, the trial court stated that it would not change its prior ruling excluding Dr. Artigues' testimony. The trial court did not articulate its reasoning from the bench, nor did it enter any written order in support of its ruling. Even had the trial court entered an order with findings of fact and conclusions of law in support of its ruling, the conclusions would have been based upon application of the incorrect test for admissibility.

Pursuant to the current requirements of Rule 702, in order for Dr. Artigues' testimony to have been admissible, the trial court would have needed to determine, first, that she was "qualified by 'knowledge, skill, experience, training, or education.' " *Turbyfill*, __ N.C. App. at __, 776 S.E.2d at 254 (citations omitted). As part of this determination, the trial court would have needed to conclude that Dr. Artigues' "testimony [was] based upon sufficient facts or data[, that it was] the product of reliable principles and methods[, and that Dr. Artigues had] applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. 8C-1, 702(a). Second, Dr. Artigues' testimony must have been "relevant, meaning that it '[would] assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must [have been] reliable." *Turbyfill*, __ N.C. App. at __, 776 S.E.2d at 254 (citations omitted). The trial court acknowledged that Dr. Artigues was an expert in her field; however, there was no evidence presented concerning whether her proffered "testimony [was] based upon sufficient facts or data[, whether it was] the product of reliable principles and methods[,

and whether Dr. Artigues had] applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. 8C-1, 702(a). There was no argument made at trial that Dr. Artigues' testimony was unreliable, and there was no indication that the trial court believed it to be so. There is no indication that the trial court considered whether the proposed testimony concerning the suggestibility of children was relevant to any issue at trial. However, we note that the threshold for the relevancy prong is permissive:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). As stated in *Goode*, "in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." 341 N.C. at 529, 461 S.E.2d at 641.

Howerton, 358 N.C. at 462, 597 S.E.2d at 688-89.

Further, the trial court did not make any findings or conclusions related to Rule 403. This was, we believe, because the trial court did not conduct any Rule 403 review. If, as seems apparent, the trial court believed Dr. Artigues' testimony was inadmissible as a matter of law, the trial court would have found Rule 403 review unnecessary.

Presumably because it did not believe a full hearing on Rule 702 and Rule 403 was required, the trial court failed to conduct sufficient review of the admissibility of Dr. Artigues' proposed testimony, failed to address the requirements of Rule 702 and Rule 403, and made no findings or conclusions related to these rules. Even if the trial court excluded Dr. Artigues' testimony based upon Rule 702 or Rule 403 instead of an erroneous conclusion that *Robertson* prohibited her testimony, we would still reverse and remand. Based upon the record before us, we cannot make any determination concerning whether the trial court would have abused its discretion in excluding Dr. Artigues' testimony pursuant to either Rule 702 or Rule 403.

NEW TRIAL.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
JAMES KEITH PUGH, DEFENDANT

No. COA15-323

Filed 1 December 2015

1. Indecent Exposure—public place—in front of garage—visible from public road, shared driveway, and neighbor's home

Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by denying defendant's motion to dismiss his charge of indecent exposure in the presence of a minor. Even though, as defendant argued, he was on his own property, his exposure was in a public place because he was easily visible from the public road, from the driveway he shared with his neighbor, and from his neighbor's home.

2. Indecent Exposure—jury instructions—public place—viewable from place open to public

Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by instructing the jury that a public place is "a place which is viewable from any location open to the view of the public at large." The Court of Appeals already determined in another case that this instruction is an accurate statement of law. Further, the trial court was not required to instruct the jury that defendant had to be in view "with the naked eye and without resort to technological aids such as telescopes" because the evidence failed to support such an instruction. The victims here simply saw defendant exposing himself when they were getting out of the car with their groceries.

Appeal by defendant from judgment entered on or about 20 August 2014 by Judge Robert F. Floyd, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Paul F. Herzog, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment entered upon a jury verdict finding him guilty of indecent exposure in the presence of a minor. For the following reasons, we conclude there was no error.

I. Background

Ms. Smith[1] and her four-year-old daughter were defendant's next-door neighbors. The State's evidence tended to show that on 13 May 2013, at approximately 3:00 pm Ms. Smith and her daughter saw defendant masturbating in front of his garage. On or about 9 December 2013, defendant was indicted for felonious indecent exposure. After a trial, the jury found defendant guilty, and the trial court entered a judgment suspending defendant's active sentence and sentencing him to 30 months of supervised probation. Defendant appeals.

II. Motion to Dismiss

[1] Defendant contends that the trial court should have granted his motions to dismiss. "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

> The elements of felony indecent exposure are that an adult willfully expose the adult's private parts (1) in a public place, (2) in the presence of a person less than sixteen years old, and (3) for the purpose of arousing or gratifying sexual desire. N.C. Gen. Stat. § 14–190.9(a1) (2013).

State v. Waddell, ___ N.C. App. ___, ___, 767 S.E.2d 921, 922 (2015) (quotation marks omitted).

Defendant argues that because he was on his own property he was not in a "public place." In the context of indecent exposure, our Supreme Court has defined a "public place" as "a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons." *State v. King*, 268 N.C. 711, 711, 151 S.E.2d 566, 567 (1966) (citations and quotation marks

1. We have used a pseudonym for the complaining witness to protect her privacy.

omitted); *see State v. Fusco*, 136 N.C. App. 268, 271, 523 S.E.2d 741, 743 (1999) (concluding that it was "an accurate statement of the law" to instruct the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large").

The evidence showed that defendant's garage was directly off a public road and that his garage door opening was in full view from the street. Furthermore, defendant's property shared a driveway with Ms. Smith's property, and his garage was in full view from the front of her house. Defendant was standing on his own property, but his exposure was in a "public place" because he was easily visible from the public road, from the shared driveway, and from his neighbor's home. *See id.* Therefore, the trial court did not err in denying defendant's motion to dismiss, and this argument is overruled.

II. Jury Instructions

[2] Defendant next contends that the trial court erred in instructing the jury on the element of "public place," arguing that the trial court incorrectly instructed the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large."[2] Defendant objected both before the instructions were given and after. We review this issue as to the jury instruction

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554 (citation, quotation marks, ellipses, and brackets omitted), *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). The instruction defendant contests is a verbatim quote from the jury instruction used in *Fusco*, and this Court determined it was "an accurate statement of the law" to instruct the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large." 136 N.C. App. at 271, 523 S.E.2d at 743. Therefore, we conclude there was no error in the trial court's jury instruction.

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2. Due to an error in recordation, the trial court's full jury instructions were not provided in the transcript but instead were reconstructed in the record on appeal.

Defendant also contends that although he did not request this instruction, it was plain error for the trial court not to instruct the jury that the defendant must have been in view of the public "with the naked eye and without resort to technological aids such as telescopes" and the like. Defendant presents several hypothetical arguments in which a man lives in a house which "is set back from the highway [and other houses] by no less than 2500 feet" and he sunbathes in the nude on his porch or in his yard. Various hypothetical women who are not on his property but are using a camera with a telephoto lens, binoculars, a small plane, or a law-enforcement-owned drone then see him, *au naturel*. Although defendant's hypothetical arguments are interesting, there was absolutely no evidence of any "technological aids" used to view defendant in this case. Ms. Smith and her daughter were simply getting out of the car with their groceries when, with their non-technologically-aided eyes, they saw defendant in front of his garage next door. Even if an instruction regarding "technological aids" may be appropriate some cases, it is not needed where the evidence entirely fails to support it; so the absence of this instruction is not error, much less plain error. *See State v. Saunders*, ___ N.C. App. ___, ___, 768 S.E.2d 340, 342 (2015) (noting that for error to be plain error it must have "had a probable impact on the jury verdict"). This argument is overruled.

III. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges CALABRIA and INMAN concur.

T.M.C.S., INC. D/B/A TM CONSTRUCTION, INC., PLAINTIFF
v.
MARCO CONTRACTORS, INC., DEFENDANT

No. COA15-354

Filed 1 December 2015

1. Appeal and Error—appealability—motion to compel arbitration

An order denying a motion to compel arbitration, although interlocutory, is immediately appealable.

2. Arbitration and Mediation—denial of motion to compel—choice of law—not necessary to resolve appeal—relevant laws substantially the same

In an appeal from the denial of a motion to compel arbitration involving a construction contract, a choice of law issue was not decided because it was not necessary to resolve the appeal, and because the relevant laws of Pennsylvania and North Carolina were substantially the same and did not conflict with the Federal Arbitration Act.

3. Arbitration and Mediation—motion to compel—insufficient evidence to determine contract enforceability

The trial court did not err when denying a motion to compel arbitration by not deciding the validity and enforceability of the contract and its arbitration provision where there was an insufficient record to determine the contract's enforceability. Given the standstill that the parties' discovery battle had produced, the trial court in essence assumed that a valid arbitration agreement existed between the parties. Consequently, the trial court's conclusions would have been the same had it actually decided the validity and enforceability issues.

4. Arbitration and Mediation—motion to compel—not timely

The trial court, in properly denying a construction management company's (Marco's) motion to compel arbitration, did not err by concluding that Marco had surrendered its right to arbitrate the dispute by serving an untimely demand for arbitration on its contractor (TM). Whenever a party seeks to arbitrate a dispute outside the time specified by the arbitration agreement, it has made an untimely request and forfeited its contractual right to demand arbitration.

Appeal by defendant from order entered 1 October 2014 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2015.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse, for plaintiff-appellee.

Cafardi Ferguson Wyrick Weis & Stanger, LLC, by Christopher A. Cafardi; and Bell, Davis & Pitt, P.A., by D. Anderson Carmen, for defendant-appellant.

CALABRIA, Judge.

Defendant Marco Contractors, Inc. ("Marco") appeals from an order denying its motion to compel arbitration. For the reasons that follow, we affirm.

Background

This case arises from a construction contract for the renovation of a Wal-Mart, Inc. ("Wal-Mart") retail store. Marco, a construction management company based in Pennsylvania, regularly performs construction work for Wal-Mart. Plaintiff TM Construction, Inc. ("TM") is a licensed North Carolina general contractor. On 18 April 2013, John Yenges ("Yenges") of Marco contacted TM's president, Thomas Malone ("Malone"), regarding construction at a Wal-Mart store in Winston-Salem, North Carolina. Since it was an urgent job, Malone and Yenges met at the jobsite later that day to discuss the scope and estimated cost of the work. TM promptly provided Yenges with two written quotations—$35,250.00 for carpentry work and $44,388.00 for painting ("quotations")—both of which specified that Marco would be primarily responsible for providing the necessary materials. According to Malone, after Yenges made slight revisions to the carpentry work, the two reached an agreement that TM "would provide the services and limited specified materials based upon the terms of the quotations" provided to Marco. Subsequently, Yenges arranged for delivery of the necessary carpentry materials and painting supplies to the Wal-Mart jobsite.

On or about 23 April 2013, Yenges approached Malone with a written contract ("the contract")[1] to be executed between Marco and TM. While

1. For the sake of convenience, we refer to the document that Yenges delivered to Malone as "the contract." However, as discussed below, TM claims it is not bound by the terms of this document and the trial court did not decide whether a valid and enforceable agreement existed between the parties.

reviewing the contract, Malone noticed that the total amount, $79,638.00, matched the total recited in the quotations for labor and equipment, but the contract obligated TM to provide all necessary materials for the onstruction project. After Malone pointed out this discrepancy in the scope of work, Yenges agreed that some of the new terms were incorrect and indicated that the contract was Marco's standard form agreement. Significantly, the contract contained an arbitration provision, which stated that any disputes would be arbitrated in Pennsylvania at the option of Marco. The arbitration provision also included a 30-day time limit on submitting a demand for arbitration. Both men edited the contract provisions to match the quotations, but Yenges eventually concluded that such efforts were unnecessary and indicated that he only needed Malone to sign a draft for Marco's files. According to Malone, Yenges represented that he would change the contract's terms to mirror those of the quotations. Apparently reassured, Malone signed a signature page of the contract—which listed TM's proposed subcontractors for the job—under the impression that the terms would not be enforceable until Yenges made the appropriate changes. TM continued the project work with the impression that it was performing under the terms of the quotations.

About six weeks later, in a letter dated 3 June 2013, James Good ("Good") of Marco demanded that TM cease work on the project, claiming that Marco had no signed construction contract from TM on file. After Malone explained that Yenges had not finished the previously agreed-upon revisions, Good asked Malone to send Marco a signed copy of the contract that was to be amended. Since Good indicated the quotations' terms would be incorporated into the agreement, Malone signed and initialed the contract and back-dated it to 24 April 2013, the approximate date Yenges and Malone identified and discussed the discrepancies. Malone then faxed the document to Good, who signed for Marco on 10 June 2013.

Subsequently, Marco employee Mary Crawford asked TM to provide a quotation for additional work on the Wal-Mart's nursery area, and Malone complied with the request. In a separate communication, Good called Malone and asserted that Marco would hold TM to the original terms of the contract, which did not conform to the quotations. Although Malone responded that TM would not work under those terms, Marco accepted TM's proposal for the nursery job as additional work that was not included in the original quotations. TM completed the original

project as well as the additional nursery work, and last furnished labor or materials on 14 August 2013.

Both during and after TM's performance, Marco issued several "change orders" which reflected additions to and deductions from the contract price. Most of the change orders reduced the contract price, that is, the amount Marco would pay for TM's services. For example, Marco issued three change orders reducing the scope of TM's work and two change orders reflecting deductions for paint and other materials Marco had provided. In July and August 2013, TM sent Marco three invoices totaling $101,780.00, but Marco agreed to pay only $38,833.94, the "revised contract total" as determined by the change orders.

On 4 September 2013, TM filed a claim of lien on the real property in Forsyth County and served Marco with a claim of lien on funds. TM then filed a complaint in Forsyth County Superior Court seeking judgment on its claim of lien in the amount of $101,780.00. TM's complaint also alleged that the quotations represented the parties' contract and that Marco was in breach of it. Marco filed an answer in December 2013. After court-ordered mediation proceedings failed to produce a settlement, TM served Marco with discovery requests on 8 January 2014. The parties then engaged in a protracted battle over discovery issues, which resulted in one order granting TM's motion to compel discovery and another order granting sanctions against Marco.

When TM filed a second motion for sanctions, Marco responded by filing a motion for summary judgment. As an alternative form of relief, Marco also filed a motion to compel arbitration proceedings in Pennsylvania. After conducting a hearing in Forsyth County, the trial court entered an October 2014 order denying both of Marco's motions. The trial court denied Marco's summary judgment motion because "genuine issues as to material facts" remained. As for the motion to compel arbitration, the trial court expressly declined "to decide the issue of whether the . . . [c]ontract (and its arbitration provision) [was] valid and enforceable." The trial court concluded that even if a valid and enforceable agreement existed, Marco failed to demand arbitration within the time limit set forth in the contract. In addition, as "an independent reason" to deny the motion to compel, the trial court concluded that TM had been prejudiced by Marco's "failure to timely seek arbitration." Finally, the trial court ordered Marco to produce certain internal e-mails or provide affidavits that the relevant messages could not be recovered. Marco appeals the denial of its motion to compel arbitration.

Analysis

A. Grounds For Appellate Review

[1] As an initial matter, we note that an order denying a motion to compel arbitration, although interlocutory, is immediately appealable. *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005). This is so because " 'the right to arbitrate a claim is a substantial right which may be lost if review is delayed[.] ' " *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002) (citation omitted).

B. Choice Of Law

[2] While both Marco and TM acknowledge the choice of law issue lurking in the background of this case, neither party makes a satisfactory attempt to resolve it. Marco argues in a footnote that N.C. Gen. Stat. § 22B-2 should not be applied to invalidate the choice of law provision located in Article 19 of the contract. Article 19, entitled "CONTRACT INTERPRETATION," provides that the parties' agreement "shall be governed by the Laws of the Commonwealth of Pennsylvania[.]"

N.C. Gen. Stat. § 22B-2 (2013) states that a

> provision in any contract, subcontract, or purchase order for the improvement of real property in this State, or the providing of materials therefor, is void and against public policy if it makes the contract, subcontract, or purchase order subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.

Id. Pursuant to section 22B-2, choice of law provisions are voided "when the subject matter of the contract involves improvement to realty located in North Carolina." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

Since the contract involved providing labor and materials for the improvement of a Wal-Mart retail store (real property) located in North Carolina, it appears that section 22B-2 should apply. Marco insists, however, that Pennsylvania law applies because section 22B-2 is preempted by the Federal Arbitration Act ("FAA"), thus rendering the contract's choice of law provision enforceable. As recognized by this Court, the FAA applies when a contract calling for arbitration "evidences a transaction involving interstate commerce." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708,

711 (2005). " 'Whether a contract evidence[s] a transaction involving commerce within the meaning of the [FAA] is a question of fact' for the trial court[,]" *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) (citation omitted), and this Court "cannot make that determination in the first instance on appeal[.]" *Cornelius v. Lipscomb*, 224 N.C. App. 14, 18, 734 S.E.2d 870, 872 (2012). More importantly, neither the FAA nor its potential application to this case was ever mentioned at the hearing on Marco's motion to compel arbitration, and the trial court refused to decide whether the contract was valid and enforceable. As such, the issue of whether the FAA preempts section 22B-2 is not properly before us[2].

Even if Marco had argued below that the FAA preempts North Carolina law, its assertion that Pennsylvania law categorically applies here is incorrect. "The [FAA] was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 103 L.Ed.2d 488, 497 (1989) (internal citations and quotation marks omitted). As the United States Supreme Court has recognized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477, 103 L.Ed. 2d at 499. Furthermore, in a case where the validity and enforceability of an arbitration provision is disputed, general principles of state contract law must be applied to determine these threshold issues. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 993 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter[,] courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 907 (1996) (emphasizing that state law, "whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (citation omitted); *Park v. Merrill Lynch*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003) (citing *Kaplan* for the proposition that "state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements").

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2. Marco makes the same preemption argument as to N.C. Gen. Stat. § 22B-3, which voids forum selection clauses (requiring the prosecution or arbitration of an action in another state) in contracts entered into in North Carolina. According to Marco, any contention that the contract's forum selection clause, which requires disputes to be arbitrated in Pennsylvania, is unenforceable pursuant to section 22B-3 is meritless. TM makes no such contention, but in any event, we reject Marco's argument for the same reasons that we reject its section 22B-2 preemption argument.

The trial court denied Marco's summary judgment motion since genuine issues as to material facts regarding the renovation contract's enforceability remain. Therefore, we cannot and need not decide the choice of law issue because such a determination is not necessary to resolve this appeal. Moreover, the relevant laws of Pennsylvania and North Carolina are substantially the same, and they do not conflict with the FAA. *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378 ("The FAA only preempts state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements . . . with conditions on (their) formation and execution . . . which are not part of the generally applicable contract law." (internal citations and quotation marks omitted)); *Gaffer Ins. Co. v. Discover Reinsurance Co.*, 936 A.2d 1109, 1114 (Pa. Super. Ct. 2007) ("[R]egardless of whether the contract is governed by federal or state arbitration law, we apply general principles of Pennsylvania contract law to interpret the parties' agreement."). We will apply the general contract rules of both states, for the result is the same either way.

C. Sufficiency Of The Trial Court's Order

[3] Marco also argues that the trial court's order lacks sufficient findings of fact. According to Marco, "[b]ecause the trial court here failed and in fact refused to decide the validity and enforceability of the [c]ontract and its arbitration provision, its denial of Marco's motion to compel arbitration must be reversed and remanded on this ground alone." Based on the circumstances of this case, we disagree.

When, as here, one "party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists." *Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422 (citation and quotation marks omitted); N.C. Gen. Stat. § 1-569.6(b) (2013). "This judicial determination involves the two-step process of ascertaining: '(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.' " *Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422 (internal quotation marks omitted) (quoting *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001)); *Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa. Super. Ct. 2012) ("[W]e employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement." (citation omitted)).

Our decisions in this context have consistently held that "an order denying a motion to compel arbitration must include findings of fact" regarding the validity and scope of an arbitration agreement. *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009); *see, e.g.*, *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (adopting two-part test as to whether a dispute is subject to arbitration). Whenever a trial court has failed to include these findings in its order, this Court has routinely reversed and remanded for entry of an order that contains the necessary findings. *See, e.g.*, *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) (reversing order denying motion to compel arbitration and remanding for "a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions"); *Cornelius*, 224 N.C. App. at 16–17, 734 S.E.2d at 872 (reversing and remanding because the "order provides no findings and no explanation for the basis of the court's decision to deny the motion to compel arbitration"); *Griessel*, 199 N.C. App. at 317, 681 S.E.2d at 448 (because "the trial court made no finding of fact as to the existence of a valid agreement to arbitrate[,] . . . we must reverse the trial court's order and remand for entry of findings of fact"). Apparently, these cases were reversed and remanded because the trial court orders at issue did not the meet basic requirements of appellate review. Specifically, nothing in the orders revealed the basis of the trial court's ruling. And while the validity and scope of a purported agreement to arbitrate seem to be preliminary issues before the trial court in the course of ruling on a motion to compel arbitration, we see no talismanic quality in the resolution of these issues in every case; the appellate court simply must be able to determine whether the lower court properly ruled on the motion.

Indeed, common threads run throughout our mandates reversing and remanding for failure to make the requisite findings regarding the validity and applicability of an arbitration agreement: in each case, the trial court's order was devoid of *any* meaningful findings and its rationale for denying the motion to compel arbitration could not be determined on appeal. For example, in *Cornelius*, the case upon which Marco relies, the trial court's order denying the defendant's motion to compel arbitration stated only that the court had considered all pleadings, materials, and briefs "submitted by the parties with regard to the motions" along with "the materials and testimony submitted at the hearing on the motions . . . [and the] arguments of counsel with regard to the motions." 224 N.C. App. at 17, 734 S.E.2d at 871 (2012). Because "the order provide[d] no findings and no explanation for the basis of the [trial] court's decision to deny the motion to compel arbitration[,]"

the *Cornelius* Court reversed and remanded so the requisite findings could be made. *Id.* at 17, 734 S.E.2d at 872. Similarly, in *U.S. Trust Co. v. Stanford Grp. Co.*, the trial court's order did "not set out the rationale underlying [its] decision to deny [the] defendants' motion" to compel arbitration. 199 N.C. App. 287, 291, 681 S.E.2d 512, 515 (2009) (per curiam). While the plaintiff had presented numerous possible bases in fact and law that could support the denial below, this Court remanded for additional findings because there was "no way of knowing which, if any, of those arguments were persuasive to the trial court, or whether it relied upon some other basis that might or might not be sustainable on appeal." *Id.* at 292, 681 S.E.2d at 515; *see also Ellis–Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 635, 610 S.E.2d 293, 296 (2005) ("While denial of [the] defendant's motion might have resulted from: (1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of any arbitration agreement; or, (4) any other reason, we are unable to determine the basis for the trial court's judgment."); *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) ("In the instant case, there is no indication that the trial court made any determination regarding the existence of an arbitration agreement between the parties before denying [the] defendants' motion to stay proceedings. The order denying [the] defendants' motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied [the] defendants' motion."); *Pineville Forest*, 175 N.C. App. at 387, 623 S.E.2d at 625 (since the order at issue was indistinguishable from that in *Ellis-Don*, the previous holdings in *Ellis-Don* and *Barnhouse* required that the order be reversed and remanded); *Steffes v. DeLapp*, 177 N.C. App. 802, 805, 629 S.E.2d 892, 895 (2006) ("As we cannot determine the reason for the denial, we cannot conduct a meaningful review of the trial court's conclusions of law and must reverse and remand the order for further findings."). The essence of all these opinions is that "[w]ithout findings, the appellate court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the lower court's] judgment.' " *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297 (citation omitted).

In the instant case, the trial court explicitly stated its grounds for denying Marco's motion to compel arbitration. Based on nineteen detailed findings, the court concluded that "[e]ven if the [c]ontract was valid and enforceable," (1) TM was prejudiced by Marco's delay in seeking arbitration such that Marco waived whatever right it may have had to arbitrate, and (2) Marco "failed to timely serve an arbitration demand"

under the terms of the contract. While the court declined to decide whether the contract and the arbitration provision were valid and enforceable, this approach was eminently reasonable given the case's procedural posture. In its motion for summary judgment, Marco asked the trial court to conclude that the contract was enforceable and rule in its favor based on TM's purported violation of the agreement's terms, a request the court denied since genuine issues of material fact remained unresolved. Given the standstill that the parties' discovery battle had produced, there was an insufficient record to determine the contract's enforceability. Even so, for the purpose of ruling on Marco's motion to compel arbitration, the trial court in essence assumed that a valid arbitration agreement existed between the parties. Consequently, the trial court's conclusions would have been the same had it actually decided the validity and enforceability issues. Because the trial court stated the specific bases for its ruling, the order denying Marco's motion to compel arbitration is materially distinguishable from those entered in the cases cited above. Moreover, it would be an exercise in futility to reverse and remand for further findings. Under these circumstances, the trial court was justified in putting "the cart before the horse." Accordingly, we proceed to determine whether Marco's motion to compel arbitration was properly denied. *See Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 610 A.2d 499, 500–02 (Pa. Super. Ct. 1992) (looking past the trial court's refusal to decide the applicability and enforceability of an arbitration clause and affirming an order denying a party's motion to compel arbitration, stating that the "trial court was correct in holding that the applicability and/or enforceability of the arbitration clause is *irrelevant* since [the party] had waived any right it may have had to such relief in this case") (emphasis added)).

D. Untimely Demand; Contractual Interpretation

[4] Marco next argues the trial court erred in concluding that Marco surrendered its right to arbitrate the dispute by serving an untimely demand for arbitration on TM. We disagree.

Because "[t]he law of contracts governs the issue of whether there exists an agreement to arbitrate, . . . the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271–72, 423 S.E.2d 791, 794 (1992) (internal citations omitted). "The trial court's determination of whether a dispute is subject to arbitration . . . is a conclusion of law reviewable *de novo*." *Moose*, 171 N.C. App. at 382, 614 S.E.2d at 422 (citation omitted).

Since the right to arbitration arises from contract, it may be waived in certain instances. *Cyclone Roofing Co., Inc. v. David M. LaFave Co.*, Inc., 312 N.C. 224, 321 S.E.2d 872 (1984). Our Supreme Court has held that a party impliedly *waives* its contractual right to arbitrate a dispute "if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract [would be] prejudiced by [an] order compelling arbitration." *Id.* at 229, 321 S.E.2d at 876. Some contracts, however, set a time limit for submitting a demand for arbitration, and failure to comply with such terms results in a party's *forfeiture* of its right to arbitrate. To that end, North Carolina law recognizes a distinction between an untimely demand for arbitration and a waiver of the right to arbitration. *Adams v. Nelsen*, 313 N.C. 442, 448, 329 S.E.2d 322, 326 (1985) ("In this case, the contract contained . . . a time limitation within which a party to the contract could make a demand for arbitration. Therefore, the question of whether defendant 'impliedly waived' his right to demand arbitration is not an issue in this case."). "Where the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises." 1 Martin Domke, Gabriel Wilner & Larry E. Edmonson, *Domke on Commercial Arbitration* § 19:1 (3d ed. 2015).

Whenever a party seeks to arbitrate a dispute outside the time specified by the arbitration agreement, it has made an untimely request and released—or forfeited—its contractual right to demand arbitration. *See Adams*, 313 N.C. at 448, 329 S.E.2d at 326; *Dickens v. Pa. Tpk. Comm'n*, 40 A.2d 421, 423 (Pa. 1945) ("There being in the contract between the parties an arbitration agreement, its terms must be complied with as a prerequisite to the right to arbitrate. We hold that the provision in the contract that reference of question [sic] in dispute 'must be made' within 30 days 'after final quantities have been determined' is an express 'condition precedent' to such arbitration."); *see also Adams Cnty. Asphalt Co. Inc. v. Pennsy Supply Inc.*, 2 Pa. D. & C.4th 331, 335–36 (Com. Pl.) *aff'd sub nom. Adams Cnty. v. Pennsy*, 570 A.2d 1084 (Pa. Super. Ct. 1989) ("[W]e can conceive of contract provisions which, by their clarity, would set out provisions that would show clearly that the contracting parties agreed that conditions precedent had to be met before arbitration would be appropriate and, similarly, would specify, without question, that if certain conditions were not met, arbitration was not available."). Here, the trial court ruled that even if a valid arbitration agreement existed, Marco's demand to arbitrate the dispute was untimely and therefore barred under the terms of the arbitration provision.

The arbitration provision at issue provides, in pertinent part, as follows:

> All claims or disputes between the Subcontractor and the Contractor arising out of or related to this Subcontract or the breach thereof or either party's performance of their obligations under this Subcontract shall be decided by arbitration, *at the option of the Contractor*, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") currently in effect. Notice of the demand for arbitration shall be filed in writing with the *other party to this agreement* and, upon acceptance by the Contractor, *if required*, filed with the AAA. Such notice must be made within 30 days after the claim or dispute has arisen or within 30 days after the Subcontractor's work under this Subcontract has been completed, whichever is later. Arbitration under this paragraph, if involved, shall be held in Allegheny County, Pennsylvania, and shall be the Subcontractor's exclusive remedy, to the exclusion of all other remedies, including the filing of a mechanic's lien or construction lien, for any dispute within the scope of this paragraph.

(emphasis added). Marco argues the provision "requires the party asserting a claim arising or related to the [c]ontract to submit to the other party a written notice of demand for arbitration, rather than the converse." According to Marco, "[f]or a claim by [TM], such notice would activate Marco's 'option' to 'accept' the demand, or to instead allow the dispute to proceed in some other forum other than arbitration." As Marco's reasoning goes, since TM never demanded arbitration, "Marco was never 'on the clock' to accept the demand or otherwise move to compel arbitration when it filed a motion to that end in September 2014."

General principles of state contract law govern the interpretation of an arbitration agreement's terms. *Trafalgar House Constr., Inc. v. MSL Enters., Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998); *Gaffer Ins. Co.*, 936 A.2d at 1113. In construing the terms of a contract, courts "must give ordinary words their ordinary meanings." *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (citation omitted). When the language of an arbitration clause is "clear and unambiguous," we may apply the plain meaning rule to interpret its terms. *See Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 459, 531 S.E.2d 874, 878 (2000) (applying the plain meaning rule to interpret the scope of an arbitration clause).

> "Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms." . . . If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract."

State v. Philip Morris USA, Inc., 193 N.C. App. 1, 12-13, 666 S.E.2d 783, 791 (2008) (citations omitted omitted); *see also Capek v. Devito*, 767 A.2d 1047, 1050 (Pa. 2001) (" '[W]hen a written contract is clear and unequivocal, its meaning must be determined by its contents alone.' In construing a contract, we must determine the intent of the parties and give effect to all of the provisions therein." (citation omitted)).

The prefatory phrase found in the arbitration provision plainly states that all claims or disputes between the parties "shall" be arbitrated, "*at the option*" of Marco, "in accordance with the [applicable rules] of the American Arbitration Association ("AAA")." By including this language in the contract, Marco stacked the deck in its favor by reserving a unilateral right to decide whether any potential dispute would be arbitrated. But the demand obligations imparted by the notice language in the arbitration provision are clearly bilateral in nature. According to the arbitration provision's terms, if either Marco or TM wished to arbitrate a dispute, written "[n]otice of the demand for arbitration" had to be filed "with the *other party* to" the agreement "within 30 days after the claim or dispute [arose] or within 30 days after" TM completed its work under the contract, whichever was later. Despite this clear language, Marco insists that it never had cause to demand arbitration because such a demand "should *already* have been [made] by" TM. Rather conveniently, however, Marco fails to explain what portion of the provision gave it the right to demand arbitration nearly a year after TM filed its claim of lien. Furthermore, it is illogical to believe that TM would demand arbitration when it took the position that no valid agreement to arbitrate existed between the parties.

Marco also has nothing to say about the option language included in the provision, which requires notice of an arbitration demand to be filed with the AAA "upon acceptance by [Marco], *if required*." Pursuant to the plain meaning of this language, if TM demanded arbitration, Marco could either accept the demand or reject it and proceed to utilize the litigation machinery. As TM points out, notice would only be filed with the AAA upon Marco's acceptance of an arbitration demand. Yet if Marco

exercised its option to demand arbitration, notice would promptly be sent to the AAA. In other words, Marco, as the initiating party, would not be "required" to accept a demand made by itself. Again, Marco was in the driver's seat, but if it wished to arbitrate the dispute, Marco had the responsibility to make a timely demand to that effect in light of TM's refusal to do so.

Finally, Marco drafted the contract and arbitration provision contained within it. "Pursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause." *Harbour Point Homeowners' Ass'n, Inc. ex rel. its Bd. of Dirs. v. DJF Enters., Inc.*, 201 N.C. App. 720, 725, 688 S.E.2d 47, 51 (2010). Based on the language drafted by Marco, TM and Marco were both subject to the 30-day time limit placed on arbitration demands related to disputes under the contract. Since TM filed a claim of lien on the real property and served a claim of lien on funds on 4 September 2013, a dispute had arisen from the contract and Marco was obligated to file a demand for arbitration by early October 2013. Unfortunately for Marco, its motion to compel arbitration filed on 9 September 2014 was nearly a year too late. As a result, Marco forfeited its purported right to arbitrate the dispute with TM, and the trial court properly denied Marco's motion to compel arbitration.

Conclusion

Given our holding that Marco forfeited its purported right to demand arbitration, we need not address Marco's additional argument that the trial court erred by ruling that its delay in demanding arbitration prejudiced TM and constituted a waiver of its right to arbitrate. Because the trial court's order contained detailed findings which support its conclusions, we are not required to remand this case for a determination of whether a valid and enforceable arbitration agreement existed between the parties. Whether Pennsylvania or North Carolina contract law is applied, under the plain language of the allegedly enforceable agreement, Marco made an untimely demand for arbitration. Accordingly, we affirm the trial court's order denying Marco's motion to compel arbitration.

AFFIRMED.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 DECEMBER 2015)

ANTIQUITY, LLC v. ELECS. OF NC, INC. No. 15-311	Wilkes (14CVS675)	Affirmed
FCCI INS. GRP. v. HINESLEY No. 15-208	Durham (14CVS3382)	Affirmed
FUSCO v. ALLEN DESIGN ASSOCS., INC. No. 15-202	Mecklenburg (13CVS10994)	Affirmed
HOWZE v. DHILLON No. 15-465	Mecklenburg (12CVS14864)	Affirmed
IN RE A.E. No. 15-326	Transylvania (11JT7-9)	Affirmed
IN RE J.E.J. No. 15-616	Wake (11JT284)	Dismissed in part and affirmed in part
IN RE S.E.M. No. 15-524	Guilford (13JT100)	Affirmed
MANSFIELD v. REAL EST. PLUS, INC. No. 15-117	Craven (12CVS1426)	Affirmed
PARKER v. ARCARO DRIVE HOMEOWNERS ASS'N No. 15-530	Guilford (14CVS5148)	Dismissed
STATE v. BATAYNEH No. 15-132	Wake (13CRS200306)	NO PREJUDICIAL ERROR
STATE v. BIGGS No. 14-1349	Polk (13CRS247-252)	No Error
STATE v. DAWSON No. 15-420	Wake (13CRS209898-99)	No Error
STATE v. FARROW No. 15-583	New Hanover (11CRS50804)	No Error

STATE v. GILMORE No. 15-193	Guilford (13CRS96635-36) (13CRS96640) (13CRS96644) (13CRS96647) (13CRS96649-50) (13CRS96651-52) (14CRS24117)	No Error
STATE v. HARRELL No. 15-550	Forsyth (12CRS52050) (13CRS10671)	No Error
STATE v. LINDSAY No. 15-618	Cumberland (11CRS61196)	No Error
STATE v. MENDOZA-MEJIA No. 14-1261	Wake (11CRS218067)	Vacated and Remanded
STATE v. PHILLIPS No. 15-57	Gaston (13CRS53839) (13CRS53855)	No Error
STATE v. SPINKS No. 15-277	Franklin (09CRS52854) (14CRS109) (14CRS51)	No Error
STATE v. TOLBERT No. 15-479	Caldwell (13CRS53678) (14CRS765)	No Error

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